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No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

JAMES A. METZ, SR.,

Petitioner,

vs.

CSX TRANSPORTATION, INC.,

Respondent.

On Petition For Writ Of Certiorari To The District Court Of Appeal Of Florida First District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Federal Employers' Liability Act ("FELA") (45 U.S.C. § 51, *et seq.*), a discovery rule governs when a cause of action accrues for disease or injury sustained due to the cumulative effects of occupational exposure to a dangerous condition or substance over a period of time. The cause of action does not accrue for purposes of the FELA three year statute of limitations (45 U.S.C. § 56) until the plaintiff knows or, in the exercise of reasonable diligence, should know the critical facts of both (1) his injury and (2) its governing cause. The Petition presents the question, when the first of these two elements of accrual is in issue, of whether the time when the plaintiff knows or should know he has sustained an "injury" is a factual question that turns on when a reasonable person under the same circumstances would have known he had sustained a cumulative injury (as opposed to temporary pain or symptoms related to the heavy physical nature of his work) or, in the exercise of reasonable diligence, would have investigated by seeking medical examination and treatment? Or does the cause of action instead accrue as a matter of law when the plaintiff experiences any symptom, even a transient and minor one?

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FLORIDA CONSTITUTION

Art. V, § 3(b)(3), Fla. Const. 2

PETITION FOR WRIT OF CERTIORARI

Petitioner, James A. Metz, Sr. ("Petitioner" or "Metz"), respectfully prays that a writ of certiorari be issued to the District Court of Appeal for the First District of Florida to review the judgment of the District Court of Appeal filed October 29, 2007, affirming a judgment of the Circuit Court for Escambia County, Florida.

OPINIONS BELOW

The judgment of the District Court of Appeal for the First District of Florida was filed on October 29, 2007, and appears as Appendix A (App. 1). The judgment of the Court of Appeal was a "*per curiam* affirmed" ("PCA") decision, meaning there was no written opinion or citation of authority. It is unpublished. The order of the Court of Appeal denying Petitioner's Motion for Rehearing and/or Clarification and for Written Opinion was filed on December 11, 2007 and appears as Appendix D (App. 8). The judgment of the Circuit Court for the First Judicial Circuit In and For Escambia County, Florida, dated November 17, 2006, entitled Order Granting Defendant's Motion for Final Summary Judgment appears as Appendix B (App. 2). The order of the Circuit Court denying Plaintiff's Motion to Alter or Amend Order Granting Defendant's Motion for Final Summary Judgment was entered on January 16, 2007 and appears as Appendix C (App. 5).

JURISDICTION

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1257(a). The *per curiam* order of the District Court of Appeal affirming the judgment of the trial court was filed on October 29, 2007. Metz filed a timely Motion for Rehearing and/or Clarification and For Written Opinion on November 13, 2007. The order of the Court of Appeal denying Metz's Motion for Rehearing and/or Clarification and for Written Opinion was filed on December 11, 2007. This Petition for Writ of Certiorari is timely filed within ninety (90) days of December 11, 2007.

Under Art. V, § 3(b)(3), Fla. Const.,[1] the Florida Supreme Court does not "have subject-matter jurisdiction over a district court opinion that fails to expressly address a question of law, such as opinions issued without opinion or citation. Thus, a district court decision rendered without opinion or citation constitutes a decision from the highest state court empowered to hear the cause, and appeal may be taken directly to the United States Supreme Court." *The Florida Star v. B.J.F.*, 530 So.2d 286, 288 n.3

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[1] Art. V, § 3(b)(3) allows discretionary review by the Florida Supreme Court of "any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that *expressly* and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law" (emphasis supplied).

(Fla. 1988). The "*per curiam* affirmed" ("PCA") decision of the District Court of Appeal in this case is such a decision rendered without opinion or citation. In *Hobbie v. Unemployment Appeals Com'n of Florida*, 480 U.S. 136, 139 n.4 (1987), this Court also recognized that "[u]nder Florida law, a *per curiam* affirmance issued without opinion cannot be appealed to the State Supreme Court." Review by writ of certiorari may therefore be sought directly in this Court pursuant to 28 U.S.C. § 1257(a).

The question presented by this Petition is whether the Florida courts below applied a test to determine when Metz's cause of action accrued under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 and 45 U.S.C. § 56, that is contrary to federal statutory law. Petitioner's claim is under a statute of the United States.

STATUTORY PROVISIONS INVOLVED

45 U.S.C. § 51

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or

Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. . . .

45 U.S.C. § 56

§ 56. Actions; limitation; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the

United States under this chapter shall be concurrent with that of the courts of the several States.

STATEMENT OF THE CASE

This is an action filed by Petitioner Metz under the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.* ("FELA"). The Complaint was filed on April 5, 2005 (Vol.I: 1-3),[2] and alleged in substance that during his employment by CSXT at various locations over a period of years, Metz performed heavy and repetitive work in awkward, strenuous and unusual positions that caused permanent, cumulative and disabling injury to his right shoulder, right arm and upper extremities (Vol.I: 1-3). The Complaint alleged Metz's injuries were caused in whole or in part by the negligence of CSXT. Metz also filed a Motion for Leave to File a First Amended Complaint on August 18, 2006 (Vol.III: 275-279). The First Amended

[2] References to the Record on Appeal will be shown by volume and page number as follows: (V.__: ___). Plaintiff's deposition was taken on two different days and is in two corresponding volumes and set forth in full in Vol. I: 26-124 and Vol. II: 125-274 of the Record. References to the deposition are to both the volume and page number of the deposition transcript, and the volume and page number as shown in the Record. Reference to p. 6 of Volume I of the deposition, which is also p. 130 of Volume II of the Record, is shown as: (Depo.I: 6; Vol.II: 130). Transcript references to the hearing on the Motion for Summary Judgment will be shown as: (Tr. __).

Complaint was intended to conform with Metz's deposition, in which he testified to injuries to his left shoulder, neck and back, as well as his right shoulder, right arm and upper extremities (Vol.III: 275, 280).

CSXT filed a Motion for Summary Judgment arguing Metz failed to file suit prior to the expiration of the three (3) year FELA statute of limitations. 45 U.S.C. § 56. CSXT's Motion was based on Metz's deposition. CSXT pointed to Metz's testimony that he had experienced some problems with his shoulders and neck at some time during January 2002. CSXT argued Metz's cause of action accrued no later than the end of January 30, 2002 and that Metz's Complaint, filed on April 5, 2005, was therefore untimely. (Vol.I: 8-10). The question was whether Metz's claim accrued prior to April 5, 2002.

CSXT argued the accrual date for this type of cumulative injury claim was governed by the "discovery" test set forth in *United States v. Kubrick*, 444 U.S. 111 (1979), that the cause of action accrues when the plaintiff knew, or in the exercise of reasonable diligence, should have known of both his injury and its operative cause. *See Kubrick*, 444 U.S. at 120-122, especially note 7 and accompanying text. CSXT argued the discovery test imposes an "affirmative duty upon the Plaintiff to investigate the nature of the suspected injury and the potential cause(s)." (Vol.I: 18). CSXT argued this duty to investigate is triggered, and the claim accrues for limitations purposes, at the "first onset of symptoms, even those minor in nature," citing, among other authorities, *Fries v.*

Chicago Northwestern Transportation Co., 909 F.2d 1092 (7th Cir. 1990). (Vol.I: 14-15, 18-22).

As part of his response to the motion for summary judgment, Metz submitted excerpts from his medical records.[3] The first notation in Metz's medical records of any complaints concerning his shoulders, neck or back was when he visited Dr. Pace on May 6, 2002[4] and complained of pain in his right shoulder (Pl. Ex. 5; Vol.III: 334). Metz had never been diagnosed as having any problems or disorders with his arms, shoulders, or neck prior to January 2002 (Depo.I: 146; Vol.II: 270). Dr. Pace had been Metz's family physician for 21 years (Depo.I: 69, 146; Vol.II: 193, 270), and was the first doctor Metz saw concerning his shoulders, neck and back (Depo.II: 11-12; Vol.I: 36-37). Dr. Pace's diagnosis on May 6, 2002 was right shoulder tendonitis (Pl. Ex. 5; Vol.III: 334).

Metz had only just recently had a prior visit with Dr. Pace on March 1, 2002, for a routine physical, during which he did not have any symptoms, complaints or positive examination findings concerning either of his shoulders, his neck or his arms (Pl. Ex. 2; Vol.III: 328). The records of that visit do not indicate any positive examination findings by Dr. Pace or

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[3] Plaintiff also submitted his own affidavit. The trial court, however, struck the affidavit. Accordingly, Plaintiff does not rely on the affidavit in this Statement of the Case.

[4] This visit to Dr. Pace on May 6, 2002 was thus less than three (3) years prior to the filing of the Complaint on April 5, 2005.

complaints by Metz concerning either of his shoulders, his neck or his arms (Pl. Ex. 2; Vol.III: 328). The records include notations that show Dr. Pace actually examined Metz's neck and extremities, and noted his objective findings with respect to the neck as follows: "NECK: NO MASSES, LYMPHADENOPATHY, THYROMEGALY, BRUITS, OR TENDERNESS. CAROTID PULSES ARE FULL AND STRONG." With respect to the extremities, the findings were: "EXTREMITIES: NORMAL RANGE OF MOTION AND NO TENDERNESS." (Vol.III: 328). There was thus a specific finding of no tenderness in both the neck and extremities. This visit was for a routine physical (Vol.III: 330) and the records (Vol.III: 328) show that Metz was being followed by Dr. Pace for other conditions and reported the occurrence of black tarry stools during the review of systems as part of that routine exam.

Dr. Pace referred Metz to Dr. Orth for a consultation (Pl. Ex. 3; Vol.III: 330-332) because of his tarry stools and a history of cancer in Metz's family (Vol.III: 330). Metz saw Dr. Orth on March 19, 2002 (Vol.III: 330). Dr. Orth reviewed Metz's history, past medical history, and social history. Nothing was noted concerning his shoulders, neck or arms (Pl. Ex. 3; Vol.III: 330). Dr. Orth's records noted that he conducted a physical examination and specifically addressed the areas of General, Neurologic, Neck and Extremities under the heading of "Physical Examination." Dr. Orth recorded his physical examination, which included Metz's neck and extremities, as well as a

neurologic exam. No positive findings were made on examination concerning his neck, back or shoulders and the notes concerning the neck made a specific finding that the neck was "supple" and without "tenderness." (Vol.III: 331).

As noted above, Metz thereafter saw Dr. Pace on May 6, 2002 (Pl. Ex. 5; Vol.III: 334). It was during this visit that Metz first complained of pain in his right shoulder, and this was the first time Dr. Pace made any positive findings concerning the right shoulder on examination. Metz was noted to have pain with forward flexion and abduction of the right shoulder with some tenderness on the top of the right shoulder. Dr. Pace's diagnosis was tendonitis. Metz was given a trigger point injection and advised that if the right shoulder had not improved in two weeks he was to call and schedule an orthopedic consult (Pl. Ex. 5; Vol.III: 334). There were still no complaints or examination findings at all as to the left shoulder, neck or back.

Metz saw Dr. Cameron, an orthopedic surgeon, on July 3, 2002 (Pl. Ex. 6; Vol.III: 336). His right arm could be elevated only 150 degrees compared to 180 degrees on the left, and internal and external rotation of the right arm was also limited. A right shoulder arthrogram was ordered. Dr. Cameron's diagnosis after the arthrogram was shoulder impingement syndrome. Metz was scheduled for diagnostic arthroscopic surgery (Pl. Ex. 6; Vol.III: 336).

Dr. Cameron performed arthroscopic surgery on September 24, 2002 (Pl. Ex. 6; Vol.III: 337). The operative diagnosis was anterior impingement syndrome of the right shoulder and partial detachment of the posterior superior labrum. The procedures performed were diagnostic arthroscopy and arthroscopic acromioplasty with resection of coracoacromial ligament right shoulder (Pl. Ex. 6; Vol.III: 337). Metz was able to continue to work at CSXT right up until his arthroscopic surgery (Depo.I: 134; Vol.II: 258).[5]

These medical records thus showed that actual physical examination of Metz on March 1 and March 19, 2002 revealed no problems with Metz's shoulder, arms, back or neck, and that Metz made no complaints about these parts of his body. The first positive examination findings concerning Metz's right shoulder were made on May 6, 2002. There were no complaints or findings, even at that time, concerning his neck, arms or left shoulder.

Metz's deposition, when considered in the light most favorable to Metz and drawing all possible inferences in favor of Metz,[6] and when taken in light of the medical records, showed the following:

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[5] Metz's subsequent course of diagnosis, treatment and disability are not set forth here because they do not relate directly to the limitations issue.

[6] Under Florida procedural law, the court must draw every possible inference in favor of the party against whom a summary judgment is sought. *Moore v. Morris*, 475 So.2d 666, 668 (Fla. 1985); *Willis v. Sears, Roebuck & Co.*, 351 So.2d 29 (Fla.

(Continued on following page)

Metz testified he is not good with dates (Depo.I: 53; Vol.II: 177). This was also reflected in his response when he was first asked when he had first noticed symptoms in his shoulders and neck:

> Q. When did you first notice symptoms of a problem with your shoulders and neck area?
>
> A. I *guess* around January of 2002. Something like that. Around that area.

(Depo.I: 120; Vol.II: 244) (emphasis supplied). Throughout the remainder of the deposition, this "guess" then became the date that was used as the explicitly assumed factual predicate of the rest of defense counsel's questions.

Metz was next asked whether he went to see a doctor. His answer makes it clear he thought whatever symptoms he felt were minor and temporary in nature.

> Q. When you first began experiencing those symptoms, did you go see a doctor?
>
> A. No. Because I thought it was just like a, you know, little pull or something, you know, but it kept progressing.

1977). If the "record raises the slightest doubt that material issues could be present, that doubt must be resolved against the movant and the motion for summary judgment must be denied." *Henderson v. CSX Transportation, Inc.*, 617 So.2d 770, 773 (Fla. 1st DCA 1993).

> Q. Had you had little pulls before over your career working?
>
> A. Oh, yes. You know, I don't know what you call it. Not a doctor, so I don't know what you would call it. But, anyway, this (indicating) just kept getting worse and worse and worse. I figured, well, it will ease off. It will ease off. But it didn't. I was eating BC's and BC's.
>
> Q. When you first started feeling the symptoms in your shoulders and neck in January of 2002, did you believe that those symptoms were caused by your work that you had done and were doing at the railroad?
>
> A. Yes. Because every time I'd do it, it'd hurt. I didn't do it, it didn't hurt, you know.
>
> Q. And I guess I understood you to say that you waited a while before seeing a doctor because you just thought that the symptoms would resolve themselves in time?
>
> A. I guess you can say that, yes.

(Depo.I: 120-121; Vol.II: 244-245). This passage shows Metz believed his symptoms to be temporary. He had experienced similar symptoms previously in his railroad career, what Metz referred to as "little pulls," which were temporary in nature and resolved themselves. Metz regarded these symptoms of pain as being like these "little pulls" and therefore reasonably expected them to also be temporary in nature, as they obviously had been in the past. Such pain as he experienced with these "little pulls" was not constant

– it was intermittent. He didn't hurt when he was not performing work at the railroad. The hurt went away then. Metz was not asked any questions about and did not testify as to *when* the symptoms of pain became worse.

The deposition revealed even more clearly the difficulty Metz experienced in attempting to accurately recall the timing of events concerning his condition in 2002 when he was asked about which medical professionals he first saw and when concerning his shoulder, neck and back. He erroneously testified he first saw Dr. Cameron rather than Dr. Pace, and made errors as to the time frames involved – errors defense counsel attempted to prompt him to correct. In attempting to respond to these questions Metz again stated his inability to furnish dates and time frames with certainty. (Depo.I: 121-122; Vol.II: 245-246).

Metz was able to recall two incidents when he felt some pain – one involving closing a rail car door and one involving a hand brake – but did not claim that any one event caused his cumulative injuries (Depo.I: 122-123; Vol.II: 246-247). At some point in time – and he was not even asked by counsel for CSXT to specify or estimate the date or time when this occurred – he remembered his shoulder burning. After that, he said it was just weak and hurt when he reached up to pull something down or to pry on a brake shoe bar (Depo.I: 123; Vol.II: 247).

At some point – and again counsel for CSXT did not ask Metz to say when – he told one of his supervisors about experiencing pain when pulling on a car door or hand brake (Depo.I: 126-127; Vol.II: 250-251). He was then asked the following:

> Q. How much later was it after the initial conversation you think you had that you told him you needed to go to the doctor?
>
> A. I guess it progressively got worse. My guess over the next four months or so, you know, and then it got to where it just – when I picked my arm up to do something, it hurt, so.
>
> Q. It's kind of a difficult question to ask and I am trying to understand your answer.
>
> A. Hard to answer.

(Depo.I: 127; Vol.II: 251). Once more, Metz explicitly stated his answer as to timing was a "guess." Metz was not asked when it got to where it hurt when he picked up his arm to do something but the above answer clearly suggests that it was at the end of this four month period of time. Nor did counsel for CSXT ever ask whether any of Metz's symptoms were constant or continuous throughout this period of time. As noted above, his deposition indicates they were not constant or continuous. Based on this testimony, when considered in connection with Metz's medical records, it could be reasonably concluded that nothing had become "progressively" worse as of when he saw Dr. Orth on March 19, 2002. Metz saw Dr. Pace and

first reported pain in his right shoulder on May 6, 2002, well within three years of the filing of his complaint on April 5, 2005.

A jury could thus reasonably conclude that any pain Metz experienced in his shoulders prior to May 2002 was similar to the temporary "little pulls" he had previously experienced from time to time. Metz reasonably expected these "little pulls" to be temporary in nature, as they had been before, and it is clear such pain as he experienced was intermittent and went away when he was not engaged in work activities. No "progression" to anything constant or more severe had occurred as of when Metz saw Dr. Pace and Dr. Orth in March 2002. A jury could reasonably conclude from this evidence that any such "progression" did not occur until May 2002 when Metz went to Dr. Pace to report pain in his right shoulder. And based upon that, a jury could also reasonably conclude that Metz's cause of action did not accrue until after April 5, 2002. It was not shown that Metz knew or, in the exercise of reasonable diligence, should have known prior to April 5, 2002 that he had sustained a cumulative injury – rather than intermittent and temporary pain, similar to the "little pulls" he had experienced before and that he reasonably believed would be temporary – or that Metz, in the exercise of reasonable diligence, should have sought medical attention for his shoulder prior to the time he in fact saw Dr. Pace about his right shoulder on May 6, 2002.

The Motion for Summary Judgment was argued on October 25, 2006 (Tr.1-30).[7] On November 17, 2006, the trial court entered a written Order Granting Defendant's Motion for Summary Judgment (Vol.III: 342-343).

The trial court denied Metz's Motion to Alter or Amend the Order Granting Defendant's Motion for Final Summary Judgment (Vol.III; 345-346; 380-381).

On appeal the District Court of Appeal entered a *per curiam* order affirming the summary in favor of CSXT without opinion or citation of authority. Appendix A.

REASONS FOR GRANTING THE WRIT

When an FELA action is filed in state court, federal substantive law is controlling. *E.g., St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409 (1985); *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 492-493 (1980). Federal substantive law governs when a cause of action accrues under the FELA three-year statute of limitations set forth in 45 U.S.C. § 56. *Urie v. Thompson*, 337 U.S. 163, 169-171 (1949); 45 U.S.C. § 56 ("No action shall be maintained under this chapter unless commenced within three years

[7] The Motion to file the First Amended Complaint and CSXT's Motion for Summary Judgment were both heard on October 25, 2006. CSXT's Motion addressed the substance of the allegations in the First Amended Complaint (Tr. 28-30; Vol.I: 8-9).

from the day the cause of action accrued"). Under the FELA, the right to a jury trial in close or doubtful cases is "part and parcel of the remedy afforded railroad workers under the Employers' Liability Act." *Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 354 (1943). "To deprive these workers of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them." *Id.*

In *Urie*, this Court adopted a discovery-type standard to determine when "the cause of action accrued" within the meaning of 45 U.S.C. § 56 in an action for cumulative disease or injury caused by occupational exposure to a harmful substance or condition over a period of time, holding that the employee is not deemed to be "injured" for purposes of the FELA, and the cause of action therefore does not accrue, until "the *accumulated* effects of the deleterious substance manifest themselves." *Urie*, 337 U.S. at 170 (emphasis supplied). This Court rejected narrower and harsher tests of accrual that would "only serve to thwart the congressional purpose" and the "humane legislative plan" embodied in the FELA, and would have rendered the plaintiff's FELA claim "only a delusive remedy." *Urie*, 337 U.S. at 169-170.

The result reached by the Florida courts in this case effectively adopted CSXT's argument that Metz's cause of action accrued as a matter of law at the "first onset on symptoms, even those minor in nature," in January 2002 even though a jury could have determined that Metz reasonably regarded any problem or pain he experienced in his shoulders, neck or back

prior to April 5, 2002 as merely a temporary result of performing heavy manual labor that would go away, as similar "little pulls" he had experienced before during his long career with CSXT had gone away, and that it therefore cannot be said that a reasonable person in Metz's circumstances would have sought medical attention before April 5, 2002, three years prior to the filing of his complaint on April 5, 2005. The result reached by the Florida courts in this case is therefore contrary to this Court's decision in *Urie*, to the "congressional purpose" and "humane legislative plan of the FELA" relied upon by this Court in *Urie*, and to the better reasoned decisions of the federal and state courts that have considered the specific issue of when a plaintiff asserting injury due to repetitive or cumulative occupational exposure to a harmful condition or substance is deemed to be "injured" and his cause of action accrues under 45 U.S.C. § 56. CSXT's argument relied heavily on statements made in the Seventh Circuit's opinion in *Fries v. Chicago Northwestern Transportation Co.*, 909 F.2d 1092 (7th Cir. 1990), a case which is factually and legally very different from the instant case. The decision of the Florida courts is not properly supported by either the actual holding in *Fries*, or any statement made in the course of the *Fries* opinion. However, some of the language in *Fries*, if taken out of context, may possibly be misread and improperly applied to lead to an erroneous result, such as that reached by the Florida courts in this case.

This Court should grant certiorari to clarify this issue, and to make clear that the issue of when an FELA plaintiff making a cumulative injury claim knew, or in the exercise of reasonable diligence should have known, that he had suffered an "injury" is a question of fact that turns on when a reasonable person in circumstances similar to plaintiff would have first sought medical attention and to disapprove the view that the cause of action automatically accrues as a matter of law at the time he first experiences any symptom, however small.

The General Test of When a Cause of Action Accrues Under 45 U.S.C. § 56

In FELA cases involving traumatic injury, the cause of action accrues when the injury occurs, because the effects of the injury are immediately apparent, even if the full extent of the resulting disability is not known at the time of the injury. *E.g.*, *Sabalka v. Burlington Northern and Santa Fe Ry. Co.*, 54 S.W.3d 605, 609 (Mo.App. 2001). A different rule applies in occupational disease cases when there is an "ongoing, continuous exposure to an occupational condition which accumulates and causes disability later, perhaps many years later, after the first exposure." *Id.* When the specific date of a cumulative injury cannot be determined because the injury is the result of the plaintiff's repetitive or continual exposure to a harmful condition over a period of time, "the day the cause of action accrued" under 45 U.S.C. § 56 is determined by a "discovery" rule. The applicable rule was first

stated by this Court in *Urie v. Thompson*, 337 U.S. 163, 170 (1949). In *Urie*, plaintiff was exposed to airborne silica dust on the railroad for more than 30 years, until he became too ill to work. This Court rejected the claim the action was barred because plaintiff must have contracted silicosis more than three years before he filed suit, and held:

> We do not think the humane legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights. The record before us is clear that Urie became too ill to work in May of 1940 and that diagnosis of his condition was accomplished in the following weeks. There is no suggestion that Urie should have known he had silicosis at any earlier date. "It follows that no specific date of contact with the substance can be charged with being the date of injury, inasmuch as the injurious consequences of the exposure are the product of a period of time rather than a point of time; consequently the afflicted employee can be held to be 'injured' only when the *accumulated* effects of the deleterious substance manifest themselves * * * ."

Urie v. Thompson, 337 U.S. 163, 170 (1949) (emphasis supplied; quotation marks in Court's opinion; citation omitted).

In *United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352 (1979), this Court adopted the *Urie* approach in determining when a claim "accrues" under the Federal Tort Claims Act, 28 U.S.C. § 2401(b). *Kubrick* implicitly adopted the standard that a plaintiff must have known or, in the exercise of reasonable diligence, should have known of both his injury and its cause in order for the cause of action to accrue. *Kubrick*, 444 U.S. at 120-122, especially note 7 and accompanying text. The specific holding of *Kubrick* was a narrow one: if the plaintiff knows of both his injury and its governing cause, it is not necessary for the plaintiff to also learn that he has a legal right to sue for damages for his injury in order for the cause of action to accrue. This issue was important in *Kubrick* because on the facts knowledge of the cause of the injury – the use of a particular irrigating solution during a medical procedure – was not the equivalent of knowledge that use of that solution also constituted actionable negligence. *Kubrick* reasoned that once the plaintiff knows or should know of both his injury and its cause, the accrual of the cause of action should not be further delayed until he knows that he has a legal claim for damages, because he can protect himself by obtaining medical and legal advice to determine whether he has a cause of action.

The rule now generally accepted by both state and federal courts applying substantive federal law under the FELA, based upon *Urie* and *Kubrick* read together, is that the cause of action accrues when a reasonable person knew or, in the exercise of reasonable diligence,

should have known of both the essential facts of his injury and its governing cause. This is the statement of the general test as set forth in *Fries v. Chicago Northwestern Transportation Co.*, 909 F.2d 1092, 1095 (7th Cir. 1990), as well as in many other federal and state court FELA decisions. *E.g., Green v. CSX Transportation, Inc.,* 414 F.3d 758, 763 (7th Cir. 2005); *Monaghan v. Union Pacific Railroad Co.*, 242 Neb. 720, 729, 496 N.W.2d 895, 901 (1993); *Nichols v. Burlington Northern and Santa Fe Railway Co.*, 56 P.3d 106, 109 (Colo.App. 2002).

Under this "discovery" test, for a cause of action to accrue, both of the above elements must be satisfied. The employee must have known or, in the exercise of reasonable diligence, should have known of both (1) the injury that is the basis of his action, and (2) the cause of the injury. The issue in this case relates only to the first of these two elements: when the plaintiff knows or, in the exercise of reasonable diligence, should know he has sustained an "injury."

The Issue of When Plaintiff Knows or, In the Exercise of Reasonable Diligence, Should Know He Has Sustained A Cognizable Injury Under the "Discovery" Test: Permanent Compensable Condition v. Symptoms of Pain or Discomfort The Employee Reasonably Believes To Be Temporary In Nature

In the great majority of the reported FELA appellate decisions applying this discovery test the point in dispute is not when plaintiff knew or should

have known of the essential *fact* of his injury. The point in dispute is instead when the plaintiff knew of should have known of the governing *cause* of his injury and that it was related to his employment with the railroad.

In this case, by contrast, the issue is whether a reasonable person in Plaintiff's position knew or, with reasonable diligence, should have known before April 5, 2002 that he had sustained the cumulative *injury* to his shoulders, neck and back that is the subject of this action. For purposes of this issue there is a distinction between permanent compensable conditions and symptoms of pain or discomfort that the employee reasonably believes to be temporary in nature. An employee is not deemed "injured" under the FELA, and his cause of action does not accrue, when an employee experiences pain or symptoms which he reasonably presumes or believes to be temporary. A number of decisions illustrate the proper application of this principle.

In *Ray v. Illinois Central Railroad Co.*, 864 F.Supp. 569 (E.D. La. 1994), the basis of the claim was Morton's neuroma, a condition in which the nerves in the balls of the feet are exposed, due to walking on slag as part of plaintiff's duties for railroad. Suit was filed in February 1994. Plaintiff had complained to supervisors about discomfort from walking on slag in the 1970's and 1980's. In the 1980's, he knew that walking on slag was causing pain in his feet. His occasional pain became fairly constant prior to 1991, more than three years prior to the filing of his action, but plaintiff did not realize the

pain was severe enough to seek medical treatment until 1992, when a doctor advised him that he had Morton's neuroma. The railroad's motion for summary judgment based on limitations was denied because there was a factual issue as to when he knew or should have known he had suffered an injury. The court stated that:

> While there does appear to be no dispute that plaintiff knew his feet hurt because he walked upon slag, there is considerable dispute when plaintiff knew he suffered an injury. While plaintiff knew his feet hurt, there is a factual issue whether the pain in his feet should have caused him to seek medical attention sooner such that he could have discovered he had Morton's neuroma. Defendant may succeed in convincing the factfinder that his complaints were such that a reasonable man would have sought medical attention sooner, but this is a question of fact in dispute.

Ray, 864 F.Supp. at 570.

In *Sabalka v. Burlington Northern and Santa Fe Ry. Co.*, 54 S.W.3d 605, 609 (Mo.App. 2001), the employee filed his FELA action in December 1996, alleging that he had suffered injuries to his hands and wrists from years of exposure to vibrating power tools used in his job as a carman. In 1988 or 1989, he began to experience pain in his right hand and wrist that he associated with the use of hammers, sledge hammers and staple guns on the job. When he saw a doctor in 1994, he told the doctor that when he experienced this pain in the past, he took aspirin and

the pain resolved. The pain was intermittent and transitory, and would not recur for several months. There was no evidence that this pain incapacitated him. There was no evidence plaintiff would not have considered his symptoms as merely temporary inflammation. In 1994, he began to have increasing pain and symptoms that were not relieved by aspirin, and which he stated were different from the intermittent symptoms he had experienced prior to that time. He first saw a doctor in 1994, and was eventually diagnosed with a permanent injury to his hands and bilateral ulnar nerve injury. The court held that "there is a difference between having an injury of the type for which a claim for compensation can be filed, and an intermittent pain which is presumed to be a temporary condition, and which is resolved quickly by the taking of an analgesic such as aspirin." *Sabalka*, 54 S.W.3d at 610. In applying this Court's holding in *Urie* the court held:

> The [Supreme] court did not rule that the employee is considered injured whenever the employee is aware of any symptom, even a temporary symptom. Rather, it is a matter of when the employee should be aware that there is an injury of a compensable nature.

Sabalka, 54 S.W.3d at 611 (bracketed material supplied).

In holding the jury should not have been instructed on the statute of limitations because there was no evidence to support the instruction, *Sabalka* reasoned that:

> Indeed, we believe it would have seemed foolish to him to file a claim for compensation under the FELA prior to December 26, 1993. At that time, he had no lingering symptoms and no substantiation of any injury. He had not suffered symptoms severe enough to cause him to consult a physician about his right hand or wrist. Sabalka had absolutely no symptoms in his left hand. The intermittent symptoms did not create awareness that he was suffering from a bodily condition causing incapacity.

Sabalka, 54 S.W.3d at 612. *See also Coots v. Southern Pacific Company*, 49 Cal.2d 805, 814, 322 P.2d 460, 466 (en banc 1958) (FELA claim based on occupational dermatitis) (concurring opinion of Justice Spence) ("[I]t does not comport with sound public policy to require an employee, at his peril, to engage in litigation with his employer, when an apparently minor and temporary manifestation of skin trouble occurs."); *Fonseca v. Consolidated Rail Corporation*, 246 F.3d 585, 592 (6th Cir. 2001) (if plaintiff had filed suit at an earlier time, "without any medical evidence beyond his transient aches and pains after a long days work, the railroad would likely have claimed that the action lacked any evidentiary support").

In *Reasons v. Union Pacific R. Co.*, 886 S.W.2d 104 (Mo.App. 1994), the employee alleged he had developed occupational asthma as a result of his work environment over a period of years. While at work, he was exposed to asbestos, strong odors from diesel engines, cleaning agents, chemicals, spray paints,

dust particles and fumes from welding around motor grease and fuel oils. He experienced chest tightening, burning watery eyes, runny nose, throat tightening and difficulty in breathing while at work, but did not suffer these symptoms after he left the workplace. He believed his exposure to these substances triggered his allergies or that the symptoms he experienced were simply a normal temporary reaction to exposure to these substances similar to those anyone would experience under similar circumstances. He did not believe these symptoms were evidence of a slowly manifesting permanent condition. His allergist had informed him more than ten years before he filed his action that his working conditions were aggravating his "symptoms" and had recommended he wear a filtering apparatus or respirator at work. Another doctor had informed him five years before he filed his action that he believed there might be a connection between the employee's work and his respiratory problems. The court held this was insufficient to hold as a matter of law that the employee was aware of his condition and its cause beyond the statute of limitations time frame. The court explicitly acknowledged the statement in *Fries v. Chicago Northwestern Transportation Co.*, 909 F.2d 1092, 1096 (7th Cir. 1990) that to allow an employee to "unilaterally postpone the running of the statute of limitations by negligently failing to investigate the fact and cause of his injury would thwart the legislative intent" of the statute of limitations. The court nevertheless held that:

> [I]t is not enough to suspect a problem and a causal connection to start the statute of limitations ticking; one must either know of the problem and the probable connection or actively ignore a manifest problem which would be apparent to a reasonable person. . . . It is knowledge, and not speculation, which triggers the statute of limitations.

Reasons, 886 S.W.2d at 108-109. The court went on to state that:

> We refuse to abrogate a person's cause of action when it is unclear whether the employee was truly aware of the permanency of the problem. While there is no question employee knew his occupational conditions irritated him when he was at work, in order to find the statute of limitations has expired, we must find the employee was aware the he had sustained permanent damages that would not go away when he left his job site.

Reasons, 886 S.W.2d at 109.

In *Nichols v. Burlington Northern and Santa Fe Railway Co.*, 56 P.3d 106 (Colo.App. 2002), plaintiff claimed cumulative injury to his upper back and neck. Plaintiff had three chiropractic visits concerning neck symptoms more than three years prior to filing suit. He made statements indicating he knew more than three years prior to filing suit that the locomotive seats he used on the job were causing him discomfort and exacerbating his neck and back pain. The court distinguished intermittent pain that is

presumed to be temporary and quickly resolved from permanent cumulative injury. The court held that it was not established as a matter of law that the plaintiff knew he had a permanent cumulative injury and that a reasonable jury could conclude that prior to the limitations period plaintiff did not have reason to know that he had a work-induced cumulative injury to his neck and spine.

In *Green v. CSX Transportation, Inc.*, 414 F.3d 758, 763 (7th Cir. 2005), one of plaintiff's claims was for cumulative injury to her right shoulder. She had experienced pain in her right shoulder on several occasions more than three years prior to filing her action was aware that the pain she experienced was related to her work on the railroad. She sought medical treatment for right shoulder pain at least once more than three years prior to filing her action. The Seventh Circuit nevertheless reversed a summary judgment entered in favor of CSXT. The court concluded that none of the reports related to symptoms of right shoulder pain had been shown to be serious enough to put plaintiff on notice "that it was time to sue her employer or lose her right to do so." *Green*, 414 F.3d at 764. The court instead recognized that some manifestations of injury are sufficiently minimal that "a reasonable person would not consider whether he was injured or that it was appropriate to make inquiry." *Green*, 424 F.3d at 764 (citations omitted). *Green* held plaintiff had the right for a jury to decide whether her shoulder issues outside the limitations period put her on notice that she had

suffered a cognizable work related injury and "whether a reasonable person in her circumstances would have realized she had suffered more than a *de minimus* cumulative injury to her right shoulder and that the injury was work related." *Green*, 424 F.3d at 764-765. *See also Sandoval v. Union Pacific Railroad Co.*, 396 F.Supp. 1269, 1272-1273 (D.New Mex. 2005); *CSX Transportation, Inc. v. Adkins*, 264 Ga. 203, 442 S.E.2d 737 (1994), *cert. denied*, 513 U.S. 947 (1994); *Monaghan v. Union Pacific Railroad Co.*, 242 Neb. 720, 729, 496 N.W.2d 895, 901 (1993).

These decisions properly recognize that when, as here, a railroad employee experiences symptoms he reasonably believes to be temporary and/or minor in nature, the issue of when he knew or, in the exercise of reasonable diligence, should have known that he had sustained an "injury" turns on when a reasonable person in the same or similar circumstances would have realized that he was injured, or would have sought medical attention. This test adheres to the principles established by this Court in *Urie* and serves the "congressional purpose" and "humane legislative plan of the FELA". *Urie*, 337 U.S. at 169-170. These decisions also recognize this is a factual determination to be made by the jury when different inferences and conclusions may be drawn from the evidence.

The result reached by the Florida courts in this case effectively rejects the foregoing approach and instead adopts the position – argued by CSXT in the courts below – that the cause of action accrues as a

matter of law at the "first onset of symptoms, even those minor in nature" (Vol.I: 18-21), and is based on mistaken application of the duty to investigate that was set forth by this Court in *Kubrick*.

Kubrick simply held that the cause of action accrues when the plaintiff knows or should know that he had been injured and what caused his injury; he need not also know that there was actionable negligence entitling him to recover damages. *Kubrick* reasoned that once the plaintiff knows of his injury and its cause, he can protect himself by seeking advice as to whether he has a cause of action. *Kubrick* has since been read to hold that the discovery standard, to the extent that it looks at when the plaintiff should have known of both his injury and its governing cause, includes a duty to investigate on the part of the plaintiff. This most frequently is an issue when the plaintiff argues that his cause of action did not accrue outside the limitations period because he did not know that the *cause* of his injury was work related. *Kubrick* has been held to require that when a railroad employee is aware that he has sustained an injury, he then has a duty to act reasonably to investigate the cause of his injury and whether it is work related. He may not indefinitely delay the accrual of the cause of action on the ground that he did not know the cause was work-related by failing to seek medical advice to determine whether the cause was work-related.

This was the holding in *Fries v. Chicago Northwestern Transportation Co.*, 909 F.2d 1092, 1096 (7th

Cir. 1990). In *Fries*, suit was filed in November 1987. Both plaintiff and his wife acknowledged they suspected that plaintiff had a hearing loss as far back as 1980 and 1981. Thus, there was no real dispute as to whether plaintiff knew or should have known he had sustained an injury. Both plaintiff and his wife also acknowledged they could not attribute his hearing loss to any cause other than his work. Between 1980 and May 1985, a period of more than four years, he did not seek any medical examination or treatment for his suspected hearing loss. Plaintiff argued his cause of action did not accrue until 1985 when he obtained actual knowledge that his hearing loss was caused by his work environment from a back-to-work physical, when he was diagnosed with a hearing loss caused by his work. The court in *Fries* applied the rule that "a cause of action accrues for statute of limitations purposes when a reasonable person knows or in the exercise of reasonable diligence should have known of both the injury and its governing cause." *Fries*, 909 F.2d at 1095. "Both components require an objective inquiry into when the plaintiff knew or should have known, in the exercise of reasonable diligence, the essential facts of injury and cause." *Id.*

The court stated:

> Moreover, the injured plaintiff need not be certain which cause, if many are possible, is the governing cause but only need know or have reason to know of a potential cause. . . . That this rule imposes on injured plaintiffs an affirmative duty to investigate

> the potential cause of his injury has not been lost on the courts.

Fries, 909 F.2d at 1095 (citation omitted).

The court acknowledged that *Urie* intended to "ameliorate the harshness of statutes of limitations when the injury is hard to detect at its inception." *Fries*, 909 F.2d at 1095. "What the *Urie* Court did not do was provide an escape for plaintiffs who are aware the some type of injury exists yet who choose to ignore it by failing to seek diagnosis and investigate the cause." *Id.* Thus the court approved the statement of the district court that "[t]o allow a plaintiff to unilaterally postpone the running of the statute of limitations by negligently failing to investigate the fact and cause of his injury would thwart the legislative intent of 45 U.S.C. § 56." *Id.* at 1096. The reference to whether plaintiff has "negligently" failed to investigate explicitly indicates that the plaintiff's conduct in this regard is to be measured by what a reasonable person would do under the same or similar circumstances. *Urie v. Thompson*, 337 U.S. 163, 174 (1949) (negligence under the FELA is the "failure to do what a reasonable and prudent man ordinarily would have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done").

The entire context of *Fries* and cases like it assumes a plaintiff who is aware that he has sustained an injury. That part of the *Kubrick* test was not in issue in *Fries*. Plaintiff had been aware of an

injury in the form of hearing loss for many years. The issue was instead when he knew or should have known of the *cause* of his hearing loss and that the cause was work-related. It was in this context that the court held the plaintiff was required to investigate the cause of his injury. And it was in this context, in which plaintiff's awareness of the fact of his injury was not really in dispute, that *Fries* stated that "upon experiencing symptoms a plaintiff has a duty to investigate both the injury and any suspect cause." *Fries*, 909 F.2d at 1096. Similarly, the statements in Fries and other like cases that accrual of the cause of action is not delayed until there is a diagnosis by a doctor or until the condition reaches its maximum severity make sense when plaintiff's knowledge that he had sustained an injury is not really in issue. Taken out of this context and applied to a case where the real issue is in the first instance whether the plaintiff knew or should have known that he had sustained an *injury*, *Fries* may be improperly construed, as it was by CSXT in the courts below, to mean that the cause of action accrues as a matter of law at the "first onset on symptoms, even those minor in nature."

Moreover, applying *Fries* in this way ignores the fact that *Fries* itself defines the question in terms of whether the plaintiff has "*negligently*" failed to investigate – a factual question that turns on what a reasonable person in similar circumstances would have done. Petitioner does not dispute that the requirement of due diligence as set forth in *Kubrick* is

applicable to whether a plaintiff knows or should know that he has sustained an injury. But a plaintiff's diligence, including the point in time when he seeks medical treatment and advice, must be measured by what a reasonable person would have known and done in the same circumstances. Here the similarity between the temporary "little pulls" Metz experienced in the past to those he experienced in January 2002 – especially when considered in light of the medical records that actual examinations of Metz by physicians during March 2002 showed no evidence of any problems with his shoulders, neck or back and that the very first positive examination findings as to his right shoulder were not until May 6, 2002 – demonstrates that a jury could find Metz did not know and, in the exercise of reasonable diligence, did not have reason to know he had sustained an "injury" prior to April 5, 2002. As *Green v. CSX Transportation, Inc.*, 414 F.3d 758, 763 (7th Cir. 2005) (a decision of the Seventh Circuit, as was *Fries*),[8] and the other cases cited above show, some symptoms or manifestations of injury are sufficiently minimal that "a reasonable person would not consider whether he was injured or that it was appropriate to make inquiry." *Green*, 414 F.3d at 764 (citations omitted). The issue of whether such symptoms put him on notice that he had suffered a cognizable work related injury, and

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[8] It is of interest on this point that Judge Bauer, the author of *Fries*, was also a member of the panel that later decided *Green*.

whether a reasonable person in his circumstances would have realized he "had suffered more than a *de minimus* cumulative injury . . . and that the injury was work related," *Green*, 414 F.3d at 764-765, should have been submitted to and decided by a jury rather than being concluded as a matter of law by the trial judge on summary judgment.

CONCLUSION

For these reasons Petitioner James A. Metz. Sr., respectfully prays this Honorable Court to issue its writ of certiorari to the District Court of Appeals for the First District of Florida, and to reverse the judgment of the Florida courts and remand this cause for trial.

Respectfully submitted,

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JAMES A. METZ, SR.,

Appellant,

v.

CSX TRANSPORTATION, INC., a Virginia corporation,

Appellee. /

IN THE DISTRICT COURT OF APPEAL FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D07-0617

Opinion filed October 29, 2007.

An appeal from the Circuit Court for Escambia County. Jan Shackelford, Judge.

Kenneth R. Ridlehoover of Eddins, Ridlehoover, & Barnes, Pensacola; Andrew S. Williams and C.M. Friedman, St. Louis, MO; Stephen J. Moore, St. Louis, MO, for Appellant.

Dennis K. Larry and Jason W. Peterson of Clark, Partington, Hart, Larry, Bond & Stackhouse, Pensacola; Forrest Wilson of McDowell Knight Roedder & Sledge, L.L.C., Mobile, AL, for Appellee.

PER CURIAM.

AFFIRMED.

KAHN, PADOVANO, and HAWKES, JJ., CONCUR.

**IN THE CIRCUIT COURT OF
THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, FLORIDA**

JAMES A. METZ, SR.,

Plaintiff,

v.

CSX TRANSPORTATION, INC., a Virginia corporation,

Defendant. /

CASE NO. 05-CA-625
Division: F

ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE is before the Court pursuant to notice upon Defendant CSX Transportation Inc.'s Motion for Final Summary Judgment contending that Plaintiff failed to file his claim within the applicable statute of limitations. In response to Defendant's motion, Plaintiff filed an affidavit with certain medical records attached as exhibits. Plaintiff also filed a Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment. Defendant filed a Motion to Strike Affidavit and Exhibits. In response to Defendant's motion to strike, Plaintiff filed Plaintiff's Response to Defendant's Motion to Strike and Motion to Supplement. Plaintiff's counsel, Andrew Williams, also filed an affidavit in support of Plaintiff's Motion to Supplement. Additionally, the Court has reviewed Volume I and Volume II of Plaintiff's deposition transcript that is on file in the Court file.

This Court, having considered the above referenced motions, memoranda, affidavits and deposition transcripts, and having heard oral argument of counsel, finds as follows:

1. Defendant's Motion to Strike Exhibits attached to Plaintiff's affidavit is denied. Plaintiff's Motion to Supplement is granted. The medical records attached as exhibits to Plaintiff's affidavit were reviewed by the Court in considering its ruling on Defendant's Motion for Final Summary Judgment.

2. The Defendant's Motion to Strike Plaintiff's Affidavit is granted. This Court finds that the sworn testimony contained in Plaintiff's affidavit is in direct conflict with his deposition testimony. Specifically, Plaintiff's affidavit conflicts with the deposition testimony contained on page 120 and 127 of Volume I of Plaintiff's deposition transcript.

3. Defendant's Motion for Final Summary Judgment is granted. This Court finds that final summary judgment shall be entered in favor of Defendant and Plaintiff shall take nothing by his Complaint.

4. The Court reserves jurisdiction to assess taxable costs against Plaintiff.

DONE AND ORDERED at Pensacola, Escambia County, Florida this 17th day of November, 2006.

/S/ Jan Shackelford
Circuit Judge Jan Shackelford

Conformed copies to:
Jason Peterson, Esq.
Forrest C. Wilson, III, Esq.
Andrew Williams, Esq.
Kenneth R. Ridlehoover, Esq.

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT IN AND FOR ESCAMBIA COUNTY, FLORIDA

JAMES A. METZ, SR.,

Plaintiff,

v.

CSX TRANSPORTATION, INC., a Virginia corporation,

Defendant. /

CASE NO. 05-CA-625
Division: F

ORDER DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION TO STRIKE SUPPLEMENTAL AFFIDAVITS

THIS CAUSE is before the Court pursuant to its review of Plaintiff's Motion to Alter or Amend Order Granting Defendant's Motion for Final Summary Judgment and its review of Defendant's Motion to Strike Supplemental Affidavits.

On November 21, 2006, this Court entered final summary judgment in favor of the Defendant finding that Plaintiff failed to file his claim within the applicable statute of limitations. On December 1, 2006, Plaintiff timely filed the subject Motion to Alter or Amend the Order Granting Defendant's Motion for Final Summary Judgment. In support of Plaintiff's motion to alter or amend, Plaintiff filed supplemental

affidavits of James A. Metz, Sr., Dr. James Pace, and Dr. Robert Cameron. The physicians' affidavits were presented for the first time after this Court rendered summary judgment in favor of the Defendant. In response to Plaintiff's Motion to Alter or Amend the Order Granting Defendant's Motion for Final Summary Judgment, Defendant filed an opposition to Plaintiff's motion and filed a Motion to Strike Supplemental Affidavits. This Court, having reviewed Plaintiff's Motion to Alter or Amend the Order Granting Defendant's Motion for Final Summary Judgment, having reviewed Plaintiff's supplement to his motion to alter or amend, having reviewed Defendant's written opposition to Plaintiff's motion, and having reviewed Defendant's Motion to Strike Supplemental Affidavits, finds as follows:

1. Plaintiff's Motion to Alter or Amend the Order Granting Defendant's Motion for Final Summary Judgment is denied.

2. Defendant's Motion to Strike Supplemental Affidavits is granted.

DONE AND ORDERED at Pensacola, Escambia County, Florida this 16th day of January, 2007.

/s/ Jan Shackelford
Circuit Judge Jan Shackelford

Conformed copies to:
Jason Peterson, Esq.
Forrest C. Wilson, III, Esq.
Andrew Williams, Esq.
Kenneth R. Ridlehoover, Esq.

DISTRICT COURT OF APPEAL,
FIRST DISTRICT
301 S. Martin Luther King, Jr. Blvd.
Tallahassee, Florida 32399-1850
Telephone No. (850) 488-6151

December 11, 2007

CASE NO.: 1D07-617
L.T. No.: 05-CA-625

James A. Metz, Sr.	v.	Csx Transportation, Inc., A Virginia Corporation
Appellant/Petitioner(s),		Appellee/Respondent(s)

BY ORDER OF THE COURT:

Appellants motion filed November 13, 2007, for rehearing and/or clarification and for written opinion is denied.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order

Served:

Newton G. Mccoy
Kenneth R. Ridlehoover
Forrest Wilson
C. M. Friedman
Stephen J. Moore
Dennis K. Larry
Andrew S. Williams
Jason W. Peterson

jm

/s/ Jon S. Wheeler [SEAL]
JON S. WHEELER, CLERK

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(2)

No. 07-1159

In the Supreme Court of the United States

JAMES A. METZ, SR.,

Petitioner,

v.

CSX TRANSPORTATION, INC.,

Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

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QUESTION PRESENTED

Whether this Court should grant certiorari to decide whether petitioner is correct in his contention that temporary pain or symptoms do not trigger the Federal Employers' Liability Act's three-year limitations period, 45 U.S.C. § 56, when (1) the parties *agreed* in the court below that temporary pain or symptoms do not trigger the limitations period (and disagreed only about whether petitioner's pain and symptoms were in fact temporary) and (2) the court below affirmed summary judgment for respondent in an unexplained, non-precedential order.

RULE 29.6 STATEMENT

CSX Transportation, Inc. has a parent company, CSX Corporation, which is publicly traded. No other publicly held company owns more than 10% of respondent's stock.

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RESPONDENT'S BRIEF IN OPPOSITION

Under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, which governs claims by railroad employees against their employers for workplace injuries, a cause of action accrues, and the three-year limitations period begins to run, when the plaintiff has actual or constructive knowledge that he has suffered a work-related injury. Petitioner contends that work-related pain or symptoms that are merely temporary do not trigger FELA's limitations period. He argues that the Florida District Court of Appeal held otherwise and that this Court should grant review to decide whether the lower court's decision is correct.

For multiple reasons, the petition should be denied. *First*, even if the appellate court actually had rejected petitioner's position on the issue he raises here, review would be unwarranted because the decision below is a non-precedential per curiam summary affirmance with no binding effect on parties or courts in future cases. *Second*, because the court below affirmed without opinion, the court did *not* reject petitioner's position on that issue. *Third*, if the court below is presumed to have adopted the arguments of respondent (the party in whose favor it ruled), then the only possible conclusion is that the court in fact *accepted* petitioner's position. That is because respondent never denied that temporary pain or symptoms do not trigger the limitations period, and argued only that petitioner's pain and symptoms were not temporary. *Fourth*, because petitioner's own deposition testimony established that the pain and symptoms he experienced more than three years before filing suit were not temporary, the decision of

the court below affirming summary judgment for respondent was correct.

STATEMENT

A. Statutory Background

Enacted in 1908, FELA provides a compensation scheme for injuries sustained by railroad employees in the workplace. The statute preempts state-law remedies. *Norfolk S. Ry. Co.* v. *Sorrell*, 127 S. Ct. 799, 805 (2007). Unlike workers' compensation laws, which typically provide relief without regard to fault, FELA requires an injured railroad employee to prove that his employer was negligent. 45 U.S.C. § 51. The statute provides for concurrent jurisdiction of state and federal courts, 45 U.S.C. § 56, but substantively FELA actions are governed by federal law, *Sorrell*, 127 S. Ct. at 805.

Originally, the limitations period for a FELA action was two years. Act of Apr. 22, 1908, ch. 149, § 6, 35 Stat. 66. Since 1939, however, the limitations period has been three years. Act of Aug. 11, 1939, ch. 685, § 2, 53 Stat. 1404. FELA now provides that "[n]o action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." 45 U.S.C. § 56. An action not brought within three years of accrual is therefore barred.

The "standard rule" is that "the limitations period commences when the plaintiff has 'a complete and present cause of action.'" *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997) (quoting *Rawlings* v. *Ray*, 312 U.S. 96, 98 (1941)). In *Urie* v. *Thompson*, 337 U.S. 163 (1949), however, this Court adopted a different rule for FELA actions. Under lower courts'

interpretation of that decision, a "discovery" rule governs the question of when a cause of action "accrued" under FELA, at least where the plaintiff alleges a "cumulative" illness or injury resulting from long-term exposure to a harmful condition or substance. That means that a cause of action accrues when the plaintiff knows or, in the exercise of reasonable diligence, should know both that he has been injured and that his injury is work-related.[1] Under this "objective" standard, a plaintiff "must act diligently and cannot wait until the injury is actually made known to him"—by, for example, a "medical diagnosis." *Fries* v. *Chicago & N.W. Transp. Co.*, 909 F.2d 1092, 1095-1096 (7th Cir. 1990).

B. Petitioner's Lawsuit

On April 5, 2005, petitioner filed a complaint in the Circuit Court of the First Judicial Circuit in and for Escambia County, Florida, asserting that he had been injured as a result of respondent's negligence and that respondent was liable under FELA. The complaint alleged that petitioner had suffered injuries to his right shoulder, right arm, and upper extremities while working for respondent as a carman and that the injuries were cumulative in nature. 1 C.A. R. 1-3.

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[1] See, *e.g.*, *Albert* v. *Maine Cent. R.R. Co.*, 905 F.2d 541, 544 (1st Cir. 1990); *Emmons* v. *S. Pac. Transp. Co.*, 701 F.2d 1112, 1119 (5th Cir. 1983); *Mounts* v. *Grand Trunk W. R.R.*, 198 F.3d 578, 581 (6th Cir. 2000); *Greene* v. *CSX Transp., Inc.*, 843 So.2d 157, 159 (Ala. 2002); *National R.R. Passenger Corp.* v. *Krouse*, 627 A.2d 489, 495 (D.C. 1993); *Lipsteuer* v. *CSX Transp., Inc.*, 37 S.W.3d 732, 737 (Ky. 2000); *Monaghan* v. *Union Pac. R.R. Co.*, 496 N.W.2d 895, 901 (Neb. 1993); *Gay* v. *Norfolk & W. Ry. Co.*, 483 S.E.2d 216, 218 (Va. 1997).

In November 2005, petitioner was deposed. He testified that, while he had experienced random aches and pains—which he described as "pulls"—over the course of his employment with respondent, he experienced a different type of pain in January 2002. Petitioner testified that he first experienced that pain when he was attempting to close the door of a box car or loosen a hand brake and that the pain became progressively worse over the next four months. Petitioner also testified that his pain could only have been caused by his work for respondent. 2 C.A. R. 237-238, 244-253.

In March 2006, petitioner was again deposed. He again testified that he had first experienced his pain and symptoms in January 2002. 1 C.A. R. 35-38.

Medical documents that petitioner placed in the trial-court record reflect that he saw a doctor on a number of occasions between March 1 and November 6, 2002, including on May 6 and August 23, 2002. Consistent with his deposition testimony, the record of a doctor's visit on July 3, 2002 indicates that petitioner had been experiencing pain in his right shoulder for six to seven months. 3 C.A. R. 324-339.

C. The Trial Court's Decision

Respondent moved for summary judgment. It argued that petitioner's own deposition testimony established as a matter of law that, no later than January 2002, petitioner was aware or, in the exercise of reasonable diligence, should have been aware of both (1) the injuries that were the subject of his lawsuit and (2) the fact that the injuries were work-related. Because petitioner's suit was not filed until April 2005, more than three years later, respondent

argued that the suit was time-barred under FELA's three-year statute of limitations. 1 C.A. R. 8-23.

In opposing summary judgment, petitioner argued that a jury could find that he had no actual or constructive knowledge of his injuries until May 6 or even August 23, 2002. The former date, according to petitioner, was when he first complained to a doctor about the injuries that are the subject of his suit; the latter date, according to petitioner, was when he was first diagnosed with an injury. Because both of those dates are less than three years before the date on which he filed his complaint, petitioner argued that the action was not time-barred. 3 C.A. R. 286-298.

The trial court granted respondent's motion for summary judgment. Pet. App. 2-4. In a brief order, the court stated that "Defendant's Motion for Final Summary Judgment is granted," that "final summary judgment shall be entered in favor of Defendant," and that "Plaintiff shall take nothing by his Complaint." *Id.* at 3.

Petitioner then filed a motion to alter or amend the order granting summary judgment. 3 C.A. R. 345-354. The trial court denied the motion. Pet. App. 5-6.

D. The Appellate Court's Decision

Petitioner appealed to the District Court of Appeal of Florida, First District. He argued that (1) a cause of action does not accrue under FELA when the plaintiff experiences pain or symptoms that he reasonably believes to be temporary and (2) a jury could find that he reasonably believed that the pain and symptoms he experienced in January 2002 were temporary. App., *infra*, 4a-11a, 22a. Respondent did not take issue with petitioner's argument that tem-

porary pain or symptoms do not trigger FELA's limitations period. *Id.* at 13a. Instead, respondent argued that summary judgment was proper because petitioner's own deposition testimony established, as a matter of law, that his January 2002 pain and symptoms were not temporary. *Id.* at 13a-19a.

The appellate court issued a per curiam order stating that the judgment of the trial court was "AFFIRMED." Pet. App. 1. It did not issue an opinion or otherwise explain its reasoning.

Petitioner then filed a motion for rehearing and/or clarification and for a written opinion. He argued that his deposition testimony did not establish that the pain and symptoms he experienced in January 2002 were not temporary. App., *infra*, 23a-28a. The appellate court denied the motion. Pet. App. 8.

REASONS FOR DENYING THE PETITION

Petitioner contends that, when deciding whether a plaintiff had either actual or constructive knowledge of his injury for purposes of FELA's statute of limitations, a distinction must be drawn between "permanent compensable conditions" and "symptoms of pain or discomfort that the employee reasonably believes to be temporary in nature." Pet. 23. Petitioner's position is that "[a]n employee is not deemed 'injured' under FELA, and his cause of action does not accrue, when an employee experiences pain or symptoms which he reasonably presumes or believes to be temporary." *Ibid.* Petitioner claims that the Florida District Court of Appeal rejected that position in affirming summary judgment for respondent, and he asks this Court to grant certiorari to decide whether the Florida court erred in that respect.

The petition should be denied. Even if the court below rejected petitioner's position on the legal issue as to which he seeks review here, its decision does not bind parties or courts in future cases. In any event, the court did *not* reject petitioner's position on that issue, because it affirmed without opinion. Indeed, if the court below should be presumed to have adopted the arguments of respondent, then it ruled in petitioner's *favor* on the issue, because respondent did not dispute petitioner's position on the applicable law. Finally, the decision below is correct in light of the agreed-upon legal standards and the particular evidence in this case.

A. The Decision Below Has No Prospective Effect

The decision of which petitioner seeks review is a per curiam summary affirmance issued without an opinion. For that reason, it has no precedential force. *Department of Legal Affairs* v. *District Court of Appeal*, 434 So. 2d 310, 311-312 (Fla. 1983). Even assuming that the court below rejected the proposition of law petitioner urges, therefore, its order will not bind future panels of the Florida First District Court of Appeal (or circuit courts in that district). The argument that temporary pain or symptoms do not trigger FELA's limitations period will remain open to any litigant. Indeed, the appellate court is free to adopt the position urged by petitioner "in the next case presenting the issue." E. GRESSMAN, K. GELLER, S. SHAPIRO, T. BISHOP & E. HARTNETT, SUPREME COURT PRACTICE § 6.37, at 506 (9th ed. 2007). There is thus no need for this Court's intervention.

B. The Decision Below Did Not Reject The Rule Advocated By Petitioner

Petitioner is in any event mistaken in his assertion that the court below rejected the proposition of law he urges. Precisely because the court did not explain why it was affirming the grant of summary judgment, its reasons cannot be known with certainty. Petitioner tacitly concedes as much. He is unable to say that the court below explicitly *held* that a cause of action accrues under FELA when the plaintiff experiences temporary pain or symptoms, or even that the court explicitly *stated* that a cause of action accrues in that circumstance. That is because the court did not explicitly hold, or explicitly state, *anything*—other than that the trial court's decision was "AFFIRMED." Pet. App. 1. "The essence of unexplained orders is that they say nothing." *Ylst* v. *Nunnemaker*, 501 U.S. 797, 804 (1991).

Petitioner is thus constrained to argue that the "result" reached by the court below "effectively" rejected his position that a cause of action does not accrue when the plaintiff experiences pain or symptoms that are merely temporary. Pet. 17, 18, 30. But even that is pure speculation. The court did not have to reject petitioner's position to rule against him. Indeed, as we explain below, it is far more likely that the court *agreed* with petitioner about the applicable legal standard and determined that his complaint was time-barred because the pain and symptoms he experienced were not temporary.

Petitioner also argues that the "result" reached by the court below is "contrary" to decisions of lower federal and state courts that have considered when a plaintiff is deemed "injured," and thus when a cause of action accrues, under FELA's limitations provi-

sion. Pet. 18. After discussing several lower-court decisions (Pet. 23-30), petitioner claims that those decisions "properly recognize" that a FELA cause of action does not accrue when "a railroad employee experiences symptoms he reasonably believes to be temporary" (Pet. 30). There is no such conflict. The decision of the court below is not inconsistent with the decisions on which petitioner relies because, as explained above, the appellate court expressed no view on the issue addressed in those decisions—or, for that matter, on any issue.

C. If The Decision Below Should Be Presumed To Have Adopted Respondent's Arguments, Then It *Accepted* The Rule Advocated By Petitioner

When an appellate court affirms a trial court's decision without an explanation, it may be appropriate to presume that the appellate court's decision rests on the same grounds as the trial court's. But the trial court in this case did not provide an explanation either. Pet. App. 3, 6. When both the appellate court and the trial court issue unexplained orders, it may be appropriate to presume that the appellate court is adopting the arguments of the party in whose favor it rules. That appears to be petitioner's view. See Pet. 17-18, 30-31. Such a presumption, however, affords no assistance to petitioner. Quite the contrary.

If it is appropriate to presume that a court's unexplained decision adopts the arguments of the party in whose favor it rules, then it follows that the Florida District Court of Appeal did not reject—and indeed *accepted*—petitioner's position that temporary pain or symptoms are insufficient to trigger FELA's three-year limitations period. The party for which

the court below ruled is respondent, and respondent did not argue in that court that the limitations period is triggered by temporary pain or symptoms. Instead, respondent argued that the summary-judgment record established, as a matter of law, that the pain and symptoms experienced by petitioner in January 2002—more than three years before he filed suit—were not temporary.

1. In his brief on appeal, petitioner made the same argument that he makes in this Court. "An employee is not deemed 'injured' under the FELA, and his cause of action does not accrue," petitioner said, "when an employee experiences pain or symptoms which he reasonably presumes or believes to be temporary." App., *infra*, 4a. In support of that argument, petitioner relied on the same lower-court decisions on which he relies in this Court. Compare *id.* at 4a-11a with Pet. 23-30.

In responding to that argument in *its* brief on appeal, respondent said that it "*does not dispute* the general premise of plaintiff's argument or that the cases he cites support this argument." App., *infra*, 13a (emphasis added). Respondent went on to say that petitioner's argument "nevertheless fails," because petitioner's own deposition testimony establishes that the pain and symptoms he experienced in January 2002 were not temporary. *Ibid.* Respondent's brief made that point repeatedly. For example:

- "While plaintiff had experienced temporary symptoms or 'pulls' throughout his employment with the railroad, the symptoms he experienced in January of 2002 were different and distinguishable. By plaintiff's own admission, these symptoms were not 'tempo-

rary in nature,' but instead progressively worsened from their onset in January [2002]." *Ibid.*

- "[T]he January symptoms were different from the temporary symptoms that plaintiff experienced over the course of his career[.]" *Id.* at 14a.
- "It is clear that plaintiff differentiated between the temporary aches and pains (or 'pulls') that he experienced during the course of his career and the new and specifically identifiable symptoms that manifested themselves during January of 2002. It is therefore undisputed that the January symptoms were not temporary—they did not resolve themselves, but instead grew progressively worse." *Id.* at 16a-17a.
- "From a factual standpoint, it is undisputed that plaintiff's January pain was not temporary." *Id.* at 17a.

To demonstrate that the January 2002 symptoms were not temporary, respondent's brief quoted extensively from petitioner's deposition testimony. *Id.* at 14a-16a.

In its brief on appeal, respondent also distinguished the lower-court decisions on which petitioner relied. It argued that, in those cases, unlike in this one, the evidence showed that the plaintiff experienced only "temporary aches and pains of everyday work," and the defendant argued that "it was these random aches and pains that triggered the statute of limitations." App., *infra*, 17a. In this case, respondent argued, "the statute of limitations was not triggered by the temporary aches and pains that plain-

tiff experienced over the course of his career, but instead was triggered in January of 2002, when plaintiff specifically recalls experiencing a new and different pain that did not go away, but became progressively worse." *Id.* at 18a-19a. Respondent's brief thus took the position that petitioner's asserted distinction between temporary and permanent symptoms "has no bearing on this Court's decision." *Id.* at 17a.

In his reply brief on appeal, petitioner stated his understanding that respondent "*concedes* that an employee is not deemed to be 'injured' under the FELA, and his cause of action does not accrue, when the employee experiences pain or symptoms he reasonably presumes or believes to be temporary in nature." App., *infra*, 22a (emphasis added). Petitioner went on to argue that summary judgment should not have been granted because, according to him, the record permitted a jury to find that he "reasonably believed any pain or symptoms he experienced in January 2002 were temporary in nature, and that he did not experience symptoms sufficient to put a reasonable person on notice that he had suffered an injury until after April 5, 2002." *Ibid.*

The briefs in the court below thus confirm, beyond any doubt, that there was no dispute between the parties as to the governing legal standard and that the only disagreement was over the application of that standard to the record in this case. If the fact that the Florida District Court of Appeal ruled in respondent's favor means that the court should be deemed to have adopted respondent's arguments, then all that court decided was that, under an agreed-upon legal standard and the unique facts of this case, petitioner's suit was time-barred. If that is

what the court decided, moreover, then, far from being "contrary" (Pet. 18) to the decisions on which petitioner relies (Pet. 23-30), the decision below is entirely consistent with them. The other decisions applied the same legal standard and reached a different result only because the evidence in those cases permitted a finding that the plaintiff's pain or symptoms were temporary.[2]

2. To support his contention that the Florida District Court of Appeal rejected the standard he advocates, petitioner relies entirely (Pet. 6, 17, 30-31, 34) on a single sentence from respondent's motion for summary judgment in the trial court. That sentence reads as follows: "The first onset of symptoms, even those minor in nature, creates an affirmative duty upon the Plaintiff to investigate the nature of the suspected injury and the potential cause(s)." App., *infra*, 2a. But petitioner is seeking review of the appellate court's decision, not the trial court's, and respondent's arguments in the trial court are not evidence of the basis for the appellate court's unexplained order. That is particularly so because grants of summary judgment are reviewed de novo. See,

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[2] See *Fonseca* v. *Consolidated Rail Corp.*, 246 F.3d 585, 592 (6th Cir. 2001) ("transient" pain); *Green* v. *CSX Transp., Inc.*, 414 F.3d 758, 764 (7th Cir. 2005) ("intermittent" pain); *Coots* v. *Southern Pac. Co.*, 322 P.2d 460, 466 (Cal. 1958) (Spence, J., concurring) ("temporary" symptoms); *CSX Transp., Inc.* v. *Adkins*, 442 S.E.2d 737, 739 (Ga. 1994) ("temporary" symptoms); *Nichols* v. *Burlington N. & Santa Fe Ry. Co.*, 56 P.3d 106, 110 (Col. App. 2002) ("occasional" and "sporadic" pain and symptoms); *Sabalka* v. *Burlington N. & Santa Fe Ry. Co.*, 54 S.W.3d 605, 612 (Mo. App. 2001) ("temporary," "intermittent," and "transitory" pain and symptoms); *Reasons* v. *Union Pac. R.R. Co.*, 886 S.W.2d 104, 109 (Mo. App. 1994) ("temporary" symptoms).

e.g., *Florida Bar* v. *Greene*, 926 So. 2d 1195, 1200 (Fla. 2006).

In any event, the sentence seized upon by petitioner does not suggest that the limitations period would be triggered if the January 2002 symptoms were, in petitioner's words, "merely a temporary result of performing heavy manual labor that would go away, as similar 'little pulls' he had experienced before * * * had gone away." Pet. 18. Even a symptom that has not reached its full severity—*i.e.*, a symptom that may be "minor in nature" (App., *infra*, 2a)—can, depending on the circumstances, put a reasonable person on notice that he has a "permanent compensable condition[]" (Pet. 23) rather than a temporary one. Indeed, in the immediately prior sentence in its motion, respondent argued that summary judgment was proper because petitioner's "own testimony indicates that his symptoms relat[ing] to the injuries he is claiming in the litigation manifested themselves in January 2002 at the latest." App., *infra*, 2a. That language is entirely consistent with what petitioner characterizes as the applicable legal standard: whether he "knew or, with reasonable diligence, should have known before April 5, 2002" that he had sustained the injuries that are "the subject of this action." Pet. 23.

Insofar as petitioner is suggesting that respondent's position in the trial court was that FELA's limitations period is *always* triggered by "[t]he first onset of symptoms, even those minor in nature," App., *infra*, 2a, that suggestion is incorrect. Any such notion is dispelled by the second sentence in respondent's summary-judgment motion after the one on which petitioner relies: "an event resulting in minor physical symptoms *that puts a claimant on notice*

to check for injury constitutes knowledge giving rise to the accrual of a cause of action." *Ibid.* (emphasis added). That language, which also appears in respondent's brief on appeal (*id.* at 19a), makes clear that respondent's position was that the limitations period is triggered by minor symptoms only if—as with any other symptoms—they are sufficient to place the plaintiff on inquiry notice.

3. It is telling that, when petitioner filed his motion for rehearing in the Florida District Court of Appeal, he did not assert—as he asserts here—that the court erroneously held that temporary pain or symptoms can trigger FELA's limitations period. Instead, he argued that the court's error was its conclusion that petitioner's deposition testimony established that his pains and symptoms were not temporary. App., *infra*, 24a-28a.

Petitioner's motion for rehearing said the following:

> Based upon questions from the Court during argument, this Court appears to have been under the misapprehension that in his deposition testimony, Plaintiff stated that the symptoms he experienced in his shoulder and neck in January 2002, were different from the "little pulls" he had temporarily experienced in the past; that in January 2002 he had pain in his neck and shoulders that was different from what he had temporarily experienced in the past; that he had never felt similar pain or symptoms before; and that those symptoms, already different from any he had experienced before, thereafter persisted continuously from January 2002 forward and progressed.

App., *infra*, 25a. The motion went on to argue that

> [t]he answers given at deposition, when all reasonable inferences are drawn in Plaintiff's favor, indicate that Plaintiff did not seek medical attention when he first experienced symptoms in his shoulder and neck for precisely the reason that those symptoms were in fact similar to and not different from the temporary "little pulls" he had experienced previously in his railroad career that had gone away with time, and that he reasonably believed they were similarly temporary in nature as well and would also go away with time.

Id. at 27a.

Petitioner's motion for rehearing thus demonstrates that he initially interpreted the appellate court's decision precisely as respondent does. That is, he agreed that the court had affirmed the grant of summary judgment, not because it believed that temporary pain or symptoms trigger the limitations period, but because it believed that petitioner's January 2002 pain and symptoms were not temporary. Indeed, petitioner reached that conclusion "[b]ased upon questions from the Court [itself] during argument." App., *infra*, 25a. The video of the argument confirms that petitioner's initial view was correct. See http://www.1dca.org/video.html. It shows that the oral argument, like the parties' briefs, proceeded on the premise that temporary pain or symptoms do not trigger the limitations period and that the only issue on appeal was whether the summary-judgment record established that petitioner's January 2002 pain and symptoms were not temporary.

D. The Decision Below Is Correct

As explained above, the dispute between the parties in the lower courts involved only the fact-specific question whether the pain and symptoms petitioner experienced in January 2002 were the typical "pulls" he had previously experienced, as petitioner contended, or the distinct pain and symptoms that were the subject of his lawsuit, as respondent contended. Petitioner does not argue that this Court should grant certiorari to decide whether the summary-judgment record in this case justifies a conclusion that, as a matter of law, the January 2002 symptoms were permanent rather than temporary. But even if he had made such an argument, review would be unwarranted, because this Court rarely grants certiorari "when the asserted error consists of * * * the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

In any event, petitioner's January 2002 symptoms clearly were *not* temporary. At his deposition, petitioner testified without qualification that the pain and symptoms he experienced in January 2002 "kept progressing" and "kept getting worse and worse and worse" over "the next four months or so." 2 C.A. R. 244. That testimony refutes petitioner's assertion that his cause of action did not accrue until after April 5, 2002, and therefore less than three years before he filed suit. That the symptoms differed from the temporary aches and pains he had previously experienced is confirmed by petitioner's ability to recall, at his deposition, precisely when the January 2002 symptoms manifested themselves—namely, when he was "trying to close a door on a boxcar or knock a hand brake off." 2 C.A. R. 246. Petitioner's deposition testimony is corroborated by

his own medical records, which show that, as of July 2002, petitioner's shoulder pain had been "going on for 6-7 months." 3 C.A. R. 336.[3]

In light of this evidence, no rational jury could find that petitioner did not have at least constructive knowledge of his injury more than three years before he filed suit. Accordingly, summary judgment was properly entered for respondent, and the decision below affirming it was correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

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[3] Petitioner suggests that, even if his pain and symptoms were not temporary, the record does not establish that he first experienced them in January 2002, because his deposition testimony was that he "guess[ed]" he had first experienced the pain and symptoms around that time. Pet. 11 (quoting 2 C.A. R. 244). Petitioner's suggestion is baseless. Despite having had numerous opportunities to correct or clarify the point, petitioner steadfastly held to the January 2002 date throughout both days of ~~his~~ testimony. 1 C.A. R. 35-40; 2 C.A. R. 244-246, 250, 252-253, 255, 263, 266, 260-270.

Respectfully submitted.

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JUNE 2008

APPENDIX

APPENDIX A

IN THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT, IN AND FOR ESCAMBIA COUNTY, FLORIDA

JAMES A. METZ, SR.,

Plaintiff,

vs.

CSX TRANSPORTATION, INC.,

Defendant.

CASE NO. 05-625 CA
DIVISION: "F" (SHACKELFORD)

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM OF LAW

The Defendant, CSX Transportation, Inc., ("CSXT"), by and through its undersigned counsel, and pursuant to Rule 1.510, *Florida Rules of Civil Procedure*, respectfully requests the Court enter Final Summary Judgment in favor of Defendant and against Plaintiff, as there are no disputed issues of material fact regarding the fact that Plaintiff failed to bring the instant claims prior to the expiration of the applicable statute of limitations, 45 U.S.C. §56.

* * * *

[11] * * * *

C. PLAINTIFF'S CLAIM IS BARRED BY THE FELA STATUTE OF LIMITATIONS

It is clear from the record evidence that Plaintiff, like the Plaintiffs in *Fries*, *McAleer*, and *Butler*, and *Wagner*, failed the objective standard requiring him to exercise his affirmative duty to investigate the

potential cause of his injuries within the three (3) year statute of limitations period of 45 U.S.C. §56. Plaintiff's own testimony indicates that his symptoms related to the injuries he is claiming in the litigation manifested themselves in January 2002 at the latest.

The first onset of symptoms, even those minor in nature, creates an affirmative duty upon the Plaintiff to investigate the nature of the suspected injury and the potential cause(s). *Kubrick*, 444 U.S. at 123, 100 S.Ct. at 360; *Fries*, 909 F.2d at 1097; *Albert*, 905 F.2d at 544; *Wilson*, 1997 WL 633590 at 6; *Czyzewski*, 1997 WL 9791 at 4. In *Fries*, the Seventh Circuit held that tolling the statute of limitations until the Plaintiff received actual medical diagnosis that he was suffering from tinnitus is not the proper method for the accrual of the limitations period. *Fries*, 909 F.2d at 1096 [12] (citing *Nemmers v. United States*, 795 F.2d 628 (7th Cir. 1986) and *Drazan v. United States*, 762 F.2d 56 (7th Cir. 1985)). In fact, an event resulting in minor physical symptoms that puts a claimant on notice to check for injury constitutes knowledge giving rise to the accrual of a cause of action. *Crisman v. Odeco, Inc.*, 932 F.2d 413, 415 (5th Cir. 1991).[5]

* * * *

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[5] *See also, Billman v. Mo. Pac. Ry. Co.*, 825 S.W.2d 525 (Tex.App. 1992) (a critical fact causing claim to accrue can be an event that puts claimant on notice to check for injury even if it results only in minor physical effects); (*Lechowicz v. Consol, Rail Corp.*, 954 N.Y.A.D. 484 (N.Y.A.D. 4 Dept. 1993) ("[U]pon experiencing symptoms a Plaintiff has a duty to investigate both the injury and any suspect cause."); *Stachowski v. Consol. Rail Corp.*, 594 N.Y.S.2d 487, 488 (N.Y.A.D. 4 Dept. 1993) (it is when Plaintiff's problem "*first manifest[s]*" itself and Plaintiff "*suspect[s]*" that his employment is the cause, that the limitation period begins to run); *Fries v. Chicago Northwestern Transp. Co., supra.* (7th Cir. 1990) (awareness of critical facts imposes duty to investigate).

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT OF FLORIDA

APPEAL NUMBER: 1D07-617

JAMES A. METZ, SR.

Appellant-Plaintiff,

v.

CSX TRANSPORTATION, INC.

Appellee-Defendant.

A DIRECT APPEAL OF A JUDGMENT FROM THE
CIRCUIT COURT, FIRST JUDICIAL CIRCUIT,
ESCAMBIA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT
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* * * *

[21] * * * *

For purposes of when a railroad employee knows or, in the exercise of reasonable diligence, or should know the essential facts of his injury, there is a distinction between permanent compensable conditions and symptoms of pain or discomfort that the employee reasonably believes to be temporary in nature. An employee is not deemed "injured" under the FELA, and his cause of action does not accrue, when an employee experiences pain or symptoms which he reasonably presumes or believes to be temporary. A number of decisions illustrate this principle.

Ray v. Illinois Central Railroad Co., 864 F.Supp. 569 (E.D. La. 1994), involved an FELA claim for Morton's neuroma, a condition in which the nerves in the balls of the feet are exposed, due to walking on slag as part of his duties for railroad, filed on February 9, 1994. Plaintiff had complained to supervisors about discomfort from walking on slag in the 1970's and 1980's. In the 1980's, he knew that walking on slag was causing pain in his feet. His occasional pain became fairly constant prior to 1991, more than three years prior to the filing of his action, but plaintiff did not realize the pain was severe enough to seek medical treatment until 1992, when a doctor advised [22] him that he had Morton's neuroma. The railroad's motion for summary judgment on statute of limitations grounds was denied because, on these facts, there was a factual issue as to when he knew or should have known he had suffered an injury. The court stated that:

> While there does appear to be no dispute that plaintiff knew his feet

> hurt because he walked upon slag, there is considerable dispute when plaintiff knew he suffered an injury. While plaintiff knew his feet hurt, there is a factual issue whether the pain in his feet should have caused him to seek medical attention sooner such that he could have discovered he had Morton's neuroma. Defendant may succeed in convincing the factfinder that his complaints were such that a reasonable man would have sought medical attention sooner, but this is a question of fact in dispute.

Ray, 864 F.Supp. at 570.

In *Sabalka v. Burlington Northern and Santa Fe Ry. Co.*, 54 S.W.2d 505, 609 (Mo.App.2001), the employee filed his FELA action on December 26, 1996, alleging that he had suffered injuries to his hands and wrists from years of exposure to vibrating power tools used in his job as a carman. In 1988 or 1989, he began to experience pain in his right hand and wrist that he associated with the use of hammers, sledge hammers and staple guns on the job. When he saw a doctor in 1994, he told the doctor that when he experienced this pain in the past, he took aspirin and the pain resolved. The pain was intermittent and transitory, [23] and would not recur for several months. There was no evidence that this pain incapacitated him. There was no evidence plaintiff would not have considered his symptoms as merely temporary inflammation. In 1994, he began to have increasing pain and symptoms that were not relieved by aspirin, and which he stated were different from the intermittent symptoms he had

experienced prior to that time. He first saw a doctor in 1994, and was eventually diagnosed with a permanent injury to his hands and bilateral ulnar nerve injury. The court held that "there is a difference between having an injury of the type for which a claim for compensation can be filed, and an intermittent pain which is presumed to be a temporary condition, and which is resolved quickly by the taking of an analgesic such as aspirin." *Sabalka*, 54 S.W.2d at 610. In applying the United States Supreme Court's holding in *Urie*, that the employee can be considered injured only when the accumulated effect of the deleterious exposure manifests itself, the court held:

> The [Supreme] court did not rule that the employee is considered injured whenever the employee is aware of any symptom, even a temporary symptom. Rather, it is a matter of when the employee should be aware that there is an injury of a compensable nature.

Sabalka, 54 S.W.2d at 611 (bracketed material supplied).

[24] In holding that the trial court had erred in instructing the jury on the statute of limitations, because there was no evidence to support the instruction, and reversing a defense verdict, the *Sabalka* court stated that:

> Indeed, we believe it would have seemed foolish to him to file a claim for compensation under the FELA prior to December 26, 1993. At that time, he had no lingering symptoms and no substantiation of any injury.

> He had not suffered symptoms severe enough to cause him to consult a physician about his right hand or wrist. Sabalka had absolutely no symptoms in his left hand. The intermittent symptoms did not create awareness that he was suffering from a bodily condition causing incapacity.

Sabalka, 54 S.W.2d at 612. *See also Coots v. Southern Pacific Company*, 49 Cal.2d 805, 814, 322 P.2d 460, 466 (en banc 1958) (FELA claim based on occupational dermatitis) (concurring opinion of Justice Spence) ("[I]t does not comport with sound public policy to require an employee, at his peril, to engage in litigation with his employer, when an apparently minor and temporary manifestation of skin trouble occurs."); *Fonseca v. Consolidated Rail Corporation*, 246 F.3d 585, 592 (6th Cir. 2001) (if plaintiff had filed suit at an earlier time, "without any medical evidence beyond his transient aches and pains after a long days work, the railroad would likely have claimed that the action lacked any evidentiary support).

[25] In *Reasons v. Union Pacific R. Co.*, 886 S.W.2d 104 (Mo.App.1984), the plaintiff employee alleged that he had developed occupational asthma as a result of his work environment over a period of 14 years. While at work, he was exposed to asbestos, strong odors from diesel engines, cleaning agents, chemicals, spray paints, dust particles and fumes from welding around motor grease and fuel oils. He experienced chest tightening, burning watery eyes, runny nose, throat tightening and difficulty in breathing while at work, but did not suffer these symptoms after he left the workplace. The employee believed that his exposure to these substances

triggered his allergies or that the symptoms he experienced were simply a normal temporary reaction to exposure to these substances similar to those anyone would experience under similar circumstances. He did not believe these symptoms were evidence of a slowly manifesting permanent condition. His allergist had informed him more than ten years before he filed his action that his working conditions were aggravating his "symptoms" and had recommended that he wear a filtering apparatus or respirator at work. Another doctor he consulted had informed him 5 years before he filed his action that he believed there might be connection between the employee's work and his respiratory problems. The court held that this [26] was insufficient to hold as a matter of law that the employee was aware of his condition and its cause beyond the statute of limitations time frame. The court explicitly acknowledged the statement in *Fries v. Chicago Northwestern Transportation Co.*, 909 F.2d 1092, 1096 (7th Cir. 1990) that to allow an employee to "unilaterally postpone the running of the statute of limitations by negligently failing to investigate the fact and cause of his injury would thwart the legislative intent" of the statute of limitations. The court nevertheless held that:

> [I]t is not enough to suspect a problem and a causal connection to start the statute of limitations ticking; one must either know of the problem and the probable connection or actively ignore a manifest problem which would be apparent to a reasonable person . . . . It is knowledge, and not speculation,

> which triggers the statute of limitations.

Reasons, 886 S.W.2d at 108-109. The court went on to state that:

> We refuse to abrogate a person's cause of action when it is unclear whether the employee was truly aware of the permanency of the problem. While there is no question employee knew his occupational conditions irritated him when he was at work, in order to find the statute of limitations has expired, we must find the employee was aware the he had sustained permanent damages that would not go away when he left his job site.

Reasons, 886 S.W.2d at 109.

[27] In *Nichols v. Burlington Northern and Santa Fe Railway Co.*, 56 P.3d 106 (Colo.App. 2002), plaintiff claimed cumulative injury to his upper back and neck. Plaintiff had three chiropractic visits concerning neck symptoms more than three years prior to filing suit. He also made statements indicating that he knew more than three years prior to filing suit that the locomotive seats he used on the job were causing him discomfort and exacerbating his neck and back pain. The court distinguished intermittent pain that is presumed to be temporary and quickly resolved from permanent cumulative injury. The court held that it was not established as a matter of law that the plaintiff knew he had a permanent cumulative injury and that a reasonable jury could conclude that prior to the limitations period plaintiff did not have reason to know that he

had a work-induced cumulative injury to his neck and spine.

In *Green v. CSX Transportation, Inc.*, 414 F.3d 758, 763 (7th Cir. 2005), one of plaintiff's claims was for cumulative injury to her right shoulder. There was evidence that she had experienced pain in her right shoulder on several occasions more than three years prior to filing her action, that she was aware that the pain she experienced was related to her work on the railroad, and that had [28] sought medical treatment right shoulder pain at least once more than three years prior to filing her action. The Court of Appeal reversed a summary judgment entered in favor of CSXT on that claim. The Court noted that none of these reports related to symptoms of right shoulder pain had been shown to be serious enough to put plaintiff on notice "that it was time to sue her employer or lose her right to do so." *Green*, 414 F.3d at 764. The court recognized that some manifestations of injury are sufficiently minimal that "a reasonable person would not consider whether he was injured or that it was appropriate to make inquiry." *Green*, 424 F.3d at 764 (citations omitted). The Court held that plaintiff had the right for a jury to decide whether her shoulder issues outside the limitations period put her on notice that she had suffered a cognizable work related injury and "whether a reasonable person in her circumstances would have realized she had suffered more than a *de minimus* cumulative injury to her right shoulder and that the injury was work related." *Green*, 424 F.3d at 764-765. See *Sandoval v. Union Pacific Railroad Co.*, 396 F.Supp. 1269, 1272-1273 (D. New Mex. 2005) (discussing *Green* and *Ray v. Illinois Central*). *See also CSX Transportation Inc. v. Adkins*, 264 Ga. 203, 442 S.E.2d 737 (1994), *cert. denied*, 513 U.S. 947

(1994); *Kemp v.* [29] *Burlington Northern R. Co.*, 930 S.W.2d 10 (Mo.App.E.D. 1996); *Monaghan v. Union Pacific Railroad Co.*, 242 Neb. 720, 729, 496 N.W.2d 895, 901 (1993).

In this case, as will be discussed below, there is an issue of material fact as to when, in the exercise of reasonable diligence, plaintiff knew or should have known that he had sustained an "injury" under the foregoing rules, and thus an issue of material fact as to whether his cause of action accrued prior to April 5, 2002. This is an issue of fact that should be determined by a jury.

* * * *

APPENDIX C

IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT OF FLORIDA

APPEAL NUMBER: 1D07-617

JAMES A. METZ, SR.
Appellant-Plaintiff,

v.

CSX TRANSPORTATION, INC.
Appellee-Defendant.

A DIRECT APPEAL OF A JUDGEMENT FROM
THE CIRCUIT COURT, FIRST JUDICIAL
CIRCUIT, ESCAMBIA COUNTY, FLORIDA

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[23] The first argument made in plaintiff's brief is that the pain he felt in January of 2002 was only a "temporary" symptom. According to plaintiff, the law recognizes a distinction between "permanent compensable conditions and symptoms of pain or discomfort that the employee reasonably believes to be temporary in nature." (Plaintiff's brief, p. 21.) According to plaintiff, a cause of action does not accrue under the FELA when an employee believes his pain or symptoms to be temporary.[8] *Id.* In support of this argument, plaintiff cites to numerous cases which he claims to illustrate this principle. CSXT does not dispute the general premise of plaintiff's argument or that the cases he cites support this argument. However, this argument nevertheless fails, for several reasons.

The primary problem with plaintiff's argument is that his deposition testimony shows that plaintiff's symptoms manifested themselves in such a way that plaintiff knew, or in the exercise of reasonable diligence should have known, in January of 2002 that he had suffered a compensable injury. While plaintiff had experienced temporary symptoms [24] or "pulls" throughout his employment with the railroad, the symptoms he experienced in January of 2002 were different and distinguishable. By plaintiff's own admission, these symptoms were not "temporary in nature," but instead progressively worsened from their onset in January:

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[8] To the extent this argument could be construed as plaintiff taking the position that the statute was not triggered in January of 2002 because the symptoms had not fully manifested themselves and plaintiff was therefore not fully aware of his injuries, this argument is discussed and disposed of in section I(B)(1)(b)(3), *infra*.

Q. When did you first notice symptoms of a problem with your shoulders and neck area?

A. I guess around January of 2002. Something like that. Around that area.

Q When you first began experiencing those symptoms, did you go see a doctor?

A. No. Because I thought it was just like a, you know, a little pull or something, you know, **but it kept progressing.**

Q. Had you had little pulls before over your career working?

A. Oh, yes. You know, I don't know what you call it. I'm not a doctor, so I don't know what you would call it. But anyway, **this (indicating) just kept getting worse and worse and worse.** I figured, well, it will ease off. It will ease off. But it didn't. I was eating BCs and BCs.

Vol. II, p. 244.

Q. How much later was it after the initial conversation you think you had that you told him you needed to go to the doctor?

A. **I guess it progressively got worse. My guess over the next four months or so,** you know, and then it got to where it just - when I picked my arm up to do something, it hurt, so.

Vol. II, p. 251 (emphasis added).

[25] That the January symptoms were different from the temporary symptoms that plaintiff experienced over the course of his career is also highlighted by the fact that plaintiff was able to

recall, with some detail, a specific event (or a specific day) when the symptoms for which he seeks compensation in this lawsuit manifested themselves:

Q. Was there anything in particular that you did physically in January of 2002 when you first noticed the symptoms in your shoulder area and neck area that brought on those symptoms?

A. I can't remember if I was trying to close a door on a box car or knock a handbrake off. I can't remember – something is when I – I can't remember. Because we – it was a load of roll of papers I remember that on the car, so when I was trying to pull – pry the door closed, we closed the load up and keep them from falling out of the car.

Q. But you really don't know what it was that brought on the symptoms?

A. No. But I remember that hurting pretty bad something there hurt. You know.

Q. Have you had time –

A. Or maybe discomfort is what it was more than just this pain and then I had a bad time with the hand brake wheel that give me a fit and you have to go by and knock the brake off. That's when I started, you know (indicating) reaching up to knock them off.

Vol. II, p. 246

* * *

Q. Were you successful in knocking the hand brake off?

[26]A. Burned the chain in two with a torch to relieve the tension. That's how tight it was. Changed the hand brake out as far as I know.

Q. Is this something you have a specific recollection of doing this in January of 2002?

A. Well, yes.

Q. And are you certain that you were injured doing that?

MR. WILLIAMS: Well, I object. He's never said that he was injured doing that. He said he felt the symptoms at that time.

Q. Are you certain that you felt symptoms of pain in your shoulders and neck while attempting to knock the hand brake off –

A. Yes.

Q. – of the car in January 2002?

A. Yes.

* * *

Q. Let me do it again and I didn't intend to try to state it any differently. Are you certain that you felt symptoms of pain in your shoulders and neck while attempting to close the door on a box car in January of 2002?

A. Yes.

Vol. II, pp. 252-253 (emphasis added).

It is clear that plaintiff differentiated between the temporary aches and pains (or "pulls") that he

experienced during the course of his career and the new and specifically identifiable symptoms that manifested [27] themselves during January of 2002. It is therefore undisputed that these January symptoms were not temporary – they did not resolve themselves, but instead grew progressively worse.

From a factual standpoint, it is undisputed that plaintiff's January pain was not temporary. Plaintiff's argument whereby he distinguishes between temporary and permanent compensable symptoms therefore has no bearing on this Court's decision. Moreover, the cases that plaintiff cites to support this argument clarify the irrelevance of this argument. In these cases, the facts generally reveal that the plaintiffs experienced random aches and pains (comparable to the "pulls" that plaintiff described during his deposition and the "symptoms of pain or discomfort that a plaintiff reasonably believes to be temporary" as described in plaintiff's brief) during the course of their employment. The defendants in those cases argued, **unlike CSXT in the instant case,** that it was these random aches and pains that triggered the statute of limitations.

In response to this argument by the defendants, the plaintiffs argue, and the respective courts hold, that the statute of limitations is not triggered by these temporary aches and pains of everyday work, but instead that the statute starts to run when the plaintiff does something [28] that either causes a specific awareness of a new and different symptom or causes him to experience marked pain. *See, e.g., Green v. CSX Transp. Inc.*, 414 F.3d 758 (7th Cir. 2005) (intermittent complaints of pain over the years did not trigger statute of limitations, but acute, different pain [such as that that plaintiff suffered in January of 2002] did); *Nichols v. Burlington*

Northern and Santa Fe Railway Co., 56 P.3d 106 (Colorado Ct. App. 2002) (court looked to time when plaintiff had a distinct symptoms as trigger rather than to occasional complaints outside of statute of limitations); *Sabalka v. Burlington Northern and Santa Fe Railway Co.*, 54 S.W.3d 605 (Mo. App. 2001) (it was not the intermittent transitory pains that plaintiff felt throughout the course of his employment [which the court described as temporary] that triggered the statute of limitations, but instead was only when plaintiff experienced more constant and severe pain that the his claim accrued); *Fonseca v. Consolidated Rail Corp.*, 246 F.3d 585 (6th Cir. 2001) (statute was not triggered by repetitive but temporary normal discomforts of a day's work that plaintiff experienced while using hand tools and power tools at work, but was instead triggered when he developed intensified persistent pain that would not go away); *CSX Transp., Inc. v. Adkins*, 442 S.E.2d 737 (Ga. 1994) (statute [29] not triggered by symptoms of exposure that plaintiffs suffered more than three years before they filed their lawsuit since these were not the same as symptoms of degenerative brain disease, the injury for which they sought compensation).[9]

The holdings in these cases is completely consistent with CSXT's argument and the trial court's ruling – the statute of limitations was not triggered by the temporary aches and pains that plaintiff experienced over the course of his career,

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[9] *Reasons v. Union Pacific Railroad Co.*, 886 S.W.2d 104 (Mo. Ct. App. 1994) is also cited by plaintiff in this section of his brief. *Reasons* is inapplicable to the instant case, however, because the primary issue therein was when plaintiff knew that his symptoms were work–related, which is not an issue in this case.

but instead was triggered in January of 2002, when plaintiff specifically recalls experiencing a new and different pain that did not go away, but became progressively worse.

* * * *

[33] * * * *

3) **No Legal Significance Attaches to the Fact That Plaintiff's Symptoms May Not Have Reached Their Maximum Severity in January of 2002.**

Just as the statute is not tolled until such time as plaintiff goes to the doctor and receives a medical diagnosis, it is likewise not tolled until the symptoms reach their maximum severity. *Roberts v. Lain*, 32 S.W.3d 264, 269 (Tex. App. San Antonio 2000) ("Discovery" does not hinge on knowledge of the seriousness of the injury); *Williams v. Southern Pacific Transp. Co.*, 813 F.Supp. 1227, 1232 (S.D. Miss. 1992) (not necessary for injury to reach maximum severity before cause of action accrues). In fact, even an event resulting in minor physical symptoms that puts a claimant on notice to check for injury constitutes knowledge giving rise to the accrual of a cause of action. *Crisman v. Odeco, Inc.*, 932 F.2d 413, 415 (5th Cir. 1991). *See also Billman v. Mo. Pac. Ry. Co.*, 825 S.W.2d 525 (Tex. App. 1992) (a critical fact causing claim to accrue can be an event that puts claimant on notice to check for injury even if it results only in minor physical effects); *Pinczkowski v. Norfolk Southern Railway Co.*, 571 S.E.2d 4 (N.C. Ct. App. 2002) (plaintiff's claim accrued at least [34] five years before his problems became severe); *Swindell v. Florida East Coast Railway, LLC*, 2005 WL 238764, *6 (M.D. Fla. 2005) ("statute of limitations commences when the injury is

noticed and before it reaches maximum severity, not when it is later diagnosed").

* * * *

APPENDIX D

IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT OF FLORIDA

APPEAL NUMBER: 1D07-617

JAMES A. METZ, SR.

Appellant-Plaintiff,

v.

CSX TRANSPORTATION, INC.

Appellee-Defendant.

A DIRECT APPEAL OF A JUDGMENT FROM
THE CIRCUIT COURT, FIRST JUDICIAL
CIRCUIT, ESCAMBIA COUNTY, FLORIDA

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* * * *

[4] * * * *

CSXT concedes that an employee is not deemed to be "injured" under the FELA, and his cause of action does not accrue, when the employee experiences pain or symptoms he reasonably presumes or believes to be temporary in nature. See Answer Brief at 23 ("CSXT does not dispute the general premise of plaintiff's argument or that the cases he cites support this argument"). CSXT also seems to accept the view that to "trigger" the statute of limitations the "manifestation of symptoms" must be "sufficient to put a [5] reasonable person on notice that he has suffered an injury." Answer Brief at 32.

* * * *

[7] * * * *

As noted above, on summary judgment the evidence must be construed in the light most favorable the non-moving party and the court must draw every possible inference in favor of the non-moving party. When the record is reviewed under this standard, it is apparent that a jury could find that plaintiff reasonably believed any pain or symptoms he experienced in January 2002 were temporary in nature, and that he did not experience symptoms sufficient to put a reasonable person on notice that he had suffered an injury until after April 5, 2002. This is Plaintiff's argument, and the discussion in support of this argument is set forth [8] in full at pp. 30 to 40 of Plaintiff's initial Brief. Several point bear emphasis and further explanation.

* * * *

APPENDIX E

IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT OF FLORIDA

JAMES A. METZ, SR.

Appellant- Plaintiff,

v.

CSX TRANSPORTATION, INC.

Appellee-Defendant.

APPEAL NUMBER: 1D07-617

Lower Case No. 05-CA-625

MOTION FOR REHEARING AND/OR CLARIFICATION, AND FOR A WRITTEN OPINION

Plaintiff and Appellant, James A. Metz, Sr. ("Plaintiff"), by and through counsel, respectfully moves pursuant to Rule 9.330, Florida Rules of Appellate Procedure, for rehearing and/or clarification, and for a written opinion. In support of this motion, Plaintiff states as follows:

1. On October 29, 2007, this Court entered a *per curiam* opinion and order ("PCA") affirming the trial court's final order granting summary judgment in favor of Defendant and Appellee, CSX Transportation, Inc. ("CSX").

2. The trial court granted summary judgment based upon the three year statute of limitations applicable to this action under Federal Employers' Liability Act ("FELA"). 45 U.S.C. § 56, and also struck Plaintiff's affidavit, filed in support of his opposition to the motion for summary judgment,

based upon CSX's claims that the affidavit was in conflict with Plaintiff's deposition testimony.

3. To place the points to be made in this Motion in context, under the test that governs accrual under the discovery standard applicable in this cumulative [2] injury case a cause of action accrues under the FELA when a reasonable person knows or, in the exercise of reasonable diligence, should have known of both (l) the injury that is the basis of his action, and (2) the governing the cause of the injury. An employee is not deemed to be "injured" under the FELA, and his cause of action does not accrue, when the employee experiences pain or symptoms he reasonably presumes or believes to be temporary in nature. When as here, the question is when a reasonable person knew or should have known that he had sustained a compensable injury, as opposed to pain or symptoms he reasonably believed to be temporary in nature, the factual inquiry is therefore more narrowly when a reasonable person in the same or similar circumstances as the plaintiff, and in the exercise of reasonable diligence, would have first sought medical attention for the injury at issue.

4. It is most respectfully submitted that in affirming the trial court that this Court was under a misapprehension as to exactly what answers Plaintiff gave in his deposition concerning when he experienced symptoms in his shoulders or neck, and the nature of those symptoms, as opposed to the inferences drawn by the CSX as to these issues from Plaintiff's deposition testimony. It is well established that on summary judgment, all inferences are to be drawn in favor of the party opposing summary judgment, in this case Plaintiff.

5. Based upon questions from the Court during argument, this Court appears to have been under the misapprehension that in his deposition testimony, Plaintiff stated that the symptoms he experienced in his shoulder and neck in [3] January 2002, were different from the "little pulls" he had temporarily experienced in the past; that in January 2002 he had pain in his neck and shoulders that was different from what he had temporarily experienced in the past; that he had never felt similar pain or symptoms before; and that those symptoms, already different from any he had experienced before, thereafter persisted continuously from January 2002 forward and progressed. That was the inference that CSX sought to draw from Plaintiff's deposition in both the trial court and in its Answer Brief in this Court (see CSX's Answer Brief at 1-2, 21, 23-26) but it does not accurately represent the actual answers given by Plaintiff, or the inferences that may be reasonably drawn from those answers if the all inferences are drawn favor of the Plaintiff. CSX's argument in this regard did not in any way distinguish between the actual answers given by Plaintiff and the inferences CSX drew in its own favor from Plaintiff's answers.

6. The Second District Court of Appeal has very recently held that:

> The principle that a party defending a motion for summary judgment is entitled to all reasonable inferences in his or her favor "includes giving to the previous deposition any reasonable meaning which will not conflict with the subsequently filed affidavit." *Koflen v. Great Atl.&Pac. Tea Co.*, 177 So. 2d 529, 531 (Fla. 3d DCA 1965).

Ouelette v. Patel, No. 2D06-3397 (Fla. 2nd DCA 2007) (November 9, 2007) slip opinion at p. 8. Here the description of Plaintiff's deposition in CSX's Brief [4] instead drew all inferences against Plaintiff and in favor of CSX. The questions from the Court during argument thus suggest that the Court was under a misapprehension as to the actual answers given by Plaintiff at deposition in this regard, and instead accepted this description of Plaintiff's answers by CSX based upon inferences drawn by CSX in its own favor, rather than the actual answers given by Plaintiff, as an accurate description of Plaintiff's actual answers at deposition. The affirmance in this case is in conflict with the above cited cases and principles.

6. The key portions of the Plaintiff's deposition answers appear in the record at Depo. I: 120-127; Vol. II: 244-251.[1] Review of the answers actually given by Plaintiff on deposition, as opposed to the inferences drawn from those answers by CSX, indicates that the deposition may be reasonably read under the foregoing standard to be both consistent with the affidavit Plaintiff filed in support of his opposition to CSX's motion for summary judgment (Vol III: 326-327), and sufficient to create a genuine issue of material fact for trial as to when Plaintiff's cause of action accrued under the applicable discovery standard (especially when considered along with the records of Plaintiff's negative medical

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[1] Plaintiff's deposition is in two volumes contained in Vol. I: 26-124 and Vol. II: 125-274 of the Record on Appeal. References to Plaintiff's deposition are to both the volume and page number of the deposition transcript itself, and then to the volume and page number as paginated for the Record on Appeal. A reference to page 6 of Vol. I of Plaintiff's deposition, which is also page 130 of Vol. II of the Record on Appeal, is shown as follows: (Depo.I: 6; Vol.II: 130).

examinations on [5] March 1 and March 19, 2002, and his subsequent positive examination on May 6, 2002).

7. The answers given at deposition, when all reasonable inferences are drawn in Plaintiff's favor, indicate that Plaintiff did not seek medical attention when he first experienced symptoms in his shoulder and neck for precisely the reason that those symptoms were in fact similar to and not different from the temporary "little pulls" he had experienced previously in his railroad career that had gone away with time, and that he reasonably believed they were similarly temporary in nature as well and would also go away with time. He did not experience those symptoms on any continuous basis at the outset; he experienced them only when doing work activities and they went away when he was not doing railroad work. His answers indicate that at some *later* point in time, his symptoms progressed so that they became more severe and did not go away. But his answers at deposition do not indicate *when*, during the subsequent four months, his symptoms "progressed" to become continuous and more severe. That is because he was never asked at deposition to state at what point in time he in fact experienced symptoms that were different from the temporary "little pulls" of the past; he was never asked when his symptoms no longer went away and instead became persistent and continuous; he was not asked to state at what point in time he experienced symptoms that had progressed to the point where he could no longer lift his arm. A jury could reasonably conclude from Plaintiff's deposition testimony and his medical records – particularly those of his two medical [6] examinations in March 2002 that were completely negative for any neck of shoulder

problems after actual examination of his neck and extremities – that any pain Plaintiff experienced in his shoulders prior to May 2002 was similar to the temporary "little pulls" be had previously experienced from time to time. Plaintiff reasonably expected these "little pulls" to be temporary in nature, as they had been before, and it is very clear that such pain as he experienced was intermittent and went away when he was not engaged in work activities. No "progression" to anything constant or more severe had occurred as of when Plaintiff had his two negative medical examinations in March 2002 in which his shoulders and neck were actually examined without any positive findings, and with the negative findings showing no problems with the neck or shoulders documented in the records. A jury could reasonably conclude from this evidence that any such "progression" did not occur until May 2002 when Plaintiff went to Dr. Pace to report pain in his right shoulder, and when examination first revealed positive findings in his right shoulder, and that Plaintiff's cause of action therefore did not accrue until after April 5, 2002.[2]

* * * *

[2] The records of the examinations in March and May, 2002 appear in the record at Vol. III: 328-335.

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No. 07-1159

FILED

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

JAMES A. METZ, SR.,

Petitioner,

vs.

CSX TRANSPORTATION, INC.,

Respondent.

On Petition For Writ Of Certiorari To The District Court Of Appeal Of Florida First District

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Had the Florida Courts Applied the Proper Federal Standard of Accrual of the Cause of Action Under the FELA In This Case, The Issue of When Plaintiff's Cause of Action Accrued Could Not Have Been Determined As A Matter of Law On Summary Judgment.

The judgment in favor of CSXT based upon the FELA three-year statute of limitations, 45 U.S.C. § 56, was not entered on a verdict returned by a properly instructed jury after trial. It was a summary judgment. CSXT's Brief in Opposition reviews at length the evidence in the summary judgment record it contends would support a conclusion by the finder of fact at trial in CSXT's favor on the statute of limitations issue. However, CSXT studiously disregards the evidence and the reasonable inferences that would support a conclusion by the finder of fact at trial in favor of petitioner Metz. In its Brief in Opposition, CSXT views both the summary judgment record and the inferences that could be drawn from that record in the light most favorable to CSXT. CSXT thus treats the issues before the Court as if it were defending a jury verdict in its favor rendered by a properly instructed jury. And after trial and jury verdict, it is perfectly appropriate for a reviewing court to view the record in the light most favorable to the verdict.

But resolving conflicts in the evidence or the *inferences* that might be drawn from the evidence is not the role of a trial or appellate court on summary judgment. That is particularly so under the FELA. The right to a trial by jury is "part and parcel of the remedy afforded railroad workers" under the FELA. *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 354 (1943). "To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a good portion of the relief which Congress has afforded them." *Id.* Florida procedural law concerning summary judgment that applies in FELA cases in Florida state courts also emphasizes that record and all inferences from the record must be drawn in favor of the party opposing summary judgment.[1]

In this case both the Florida trial court, by entering summary judgment, and the District Court of Appeal, in its *per curiam* order affirming the summary judgment, determined that the factual issue of

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[1] *Henderson v. CSX Transportation, Inc.*, 617 So.2d 770, 772-773 (Fla. 1st DCA 1993). A party moving for summary judgment must conclusively show the absence of any issue of material fact. The court must draw "every possible inference" in favor of the party opposing summary judgment and summary judgment should not be granted "unless the facts are so crystallized that nothing remains but questions of law." *Moore v. Morris*, 475 So.2d 666, 668 (Fla. 1985). "If the evidence raises an issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by it." *Id. See also Wills v. Sears, Roebuck & Co.*, 351 So.2d 29 (1977).

when Metz's cause of action accrued could be decided in favor of CSXT as a matter of law on summary judgment under these standards. They decided that it could be determined as a matter of law that Metz's cause of action accrued prior to April 5, 2002, more than three years prior to the date this action was filed on April 5, 2005.

The broad issue here is when Metz knew or, in the exercise of reasonable diligence, should have known of the *fact* of his injury. The narrower issue this case involves is how, in turn, that is determined. In this case, the Florida courts have decided as a matter of law that Metz's cause of action accrued prior to April 5, 2002. That determination could not be made as a matter of law unless the Florida courts adopted and applied the erroneous view that a cause of action for cumulative injury under the FELA accrues at the first onset of any symptom, even one of a minor nature. As explained in the Petition, pp. 30-36, such a result represents a misreading and misapplication of the language of *Fries v. Chicago Northwestern Transportation Co.*, 909 F.2d 1092 (7th Cir. 1990), and of the duty of a party to investigate as set forth in *United States v. Kubrick*, 444 U.S. 111 (1979). Had the Florida courts applied the correct test the issue could not have been determined as a matter of law. When a railroad employee experiences symptoms he reasonably believes to be temporary and/or minor in nature, the issue of when he knew or, in the exercise of reasonable diligence, should have known that he had sustained an "injury" turns on when a reasonable

person in the same or similar circumstances would have realized that he was injured, or would have sought medical attention. In this case, that determination could not have been properly made as a matter of law because there were genuine issues of material fact precluding summary judgment under the proper standard.

This is demonstrated most vividly by the records of Plaintiff's medical examinations by Dr. Pace on March 1, 2002, by Dr. Orth on March 19, 2002, and by Dr. Pace on May 6, 2002, matters which are completely ignored by CSXT in its Brief in Opposition. These medical examinations are of crucial importance because the issue here is whether Plaintiff's cause of action accrued prior to April 5, 2002.[2] Dr. Pace had been Plaintiff's long-time primary care physician over a period of 21 years (Depo.I:69, 146; Vol. II: 193, 270). During the examination of March 1, 2002, Dr. Pace's record shows that he actually examined Metz's neck and extremities. (Pl.Ex.2; Vol. III: 328-329). Dr. Pace made a specific notation that there was no tenderness in the neck. He made a specific finding with respect to Metz's extremities that there was normal range of motion and no tenderness. The visit was for a routine physical and although Metz voiced

[2] The records of these examinations were summarized in the Petition at pp. 7-9.

complaints and concerns about other matters,[3] he made no complaints and reported no symptoms regarding his neck, back or extremities. (Pl.Ex.2; Vol. III: 328).

During the examination of March 19, 2002, Dr. Orth conducted a physical examination of Metz, who was a new patient for him, and Dr. Orth's record specifically recites that this examination included "General," "Neurologic," "Neck" and "Extremities" under the heading of "Physical Examination." (Pl.Ex.3; Vol. III: 331). Dr. Orth recorded the results of his examination, which contained no positive findings regarding Metz's neck, back or shoulders. A specific finding was made that Metz's neck was "supple" and without "tenderness." (Vol. III: 331).

This evidence would permit a finding that as of March 19, 2002, only 17 days prior to the critical date of April 5, 2002, Metz had no problems of any kind with his neck, shoulders, or back that could be detected by a physician actually examining those parts of his body. Metz reported no complaints concerning these parts of his body even while diligently seeking medical evaluation for other concerns. This evidence alone would permit a reasonable jury to conclude that Metz's cause of action did not accrue prior to April 5, 2002, and that a reasonable person in Metz's position,

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[3] Metz did complain about changes in his bowel movements, that he had black tarry stools or blood from the rectum. (Pl.Ex.2; Vol. III: 328).

and in the same or similar circumstances, would *not* have realized that he had sustained a cumulative injury to his neck, shoulders or back, or would have sought medical attention for those parts of his body. It was not until May 6, 2002, almost a month after the critical date of April 5, 2002, that Metz first complained of pain in his right shoulder and that examination by Dr. Pace was first able to identify any positive findings regarding Metz's right shoulder (pain with forward flexion and abduction of right shoulder with tenderness on the top of the right shoulder). (Pl.Ex.5; Vol. III: 334). Even then, there were no examination findings or complaints concerning the left shoulder, neck or back. Copies of the exhibits containing these medical records that were filed with the trial court as part of Metz's opposition to the motion for summary judgment and were part of the summary judgment record are included in Appendix to this Reply Brief at App. 1, App. 6 and App. 12.

CSXT places great emphasis on Metz's deposition testimony and the inferences CSXT draws from that testimony in its own favor. But that testimony must be considered in the light most favorable to Metz, the party defending summary judgment, and in the light of these records. Metz, in his Petition, reviewed the deposition testimony at length at pp. 10-15, and the Court's attention is respectfully invited to that discussion.

It is true that neither the trial court's order nor the *per curiam* order of the District Court of Appeals

affirming the judgment set forth any statement that explained the legal test that was applied to determine as a matter of law that Metz's cause of action accrued prior to April 5, 2002. The point here is that the issue could not have been determined as a matter of law in favor of CSXT had the Florida courts correctly applied the proper federal test for accrual of the cause action under the FELA. The Florida courts could have determined the issue as a matter of law only by applying an erroneous test based on the view that the cause of action under the FELA in this cumulative trauma case accrued as a matter of law at the first onset of symptoms, however minor in nature. This Court has on prior occasions granted certiorari to review unexplained *per curiam* affirmed orders of the Florida District Court of Appeal when, as here, the record below does not support the result reached under the proper legal standard established by the applicable federal law or constitutional law. *See, e.g., Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy*, 512 U.S. 136, 142 (1994); *Hobbie v. Unemployment Appeals Com'n of Florida*, 480 U.S. 136, 139 (1987).

An employee is not deemed "injured" under the FELA, and his cause of action does not accrue, when an employee experiences pain or symptoms which he reasonably presumes or believes to be temporary. When, as here, a railroad employee experiences symptoms he reasonably believes to be temporary and/or minor in nature, the issue of when he knew or, in the exercise of reasonable diligence, should have

known that he had sustained an "injury" (as opposed to pain or symptoms of a temporary nature) turns on when a reasonable person in the same or similar circumstances would have realized that he was injured, or would have sought medical attention. *E.g., Green v. CSX Transportation, Inc.*, 414 F.3d 758, 763 (7th Cir. 2005); *Sandoval v. Union Pacific Railroad Co.*, 396 F.Supp. 1269, 1272-1273 (D.New Mex. 2005); *Ray v. Illinois Central Railroad Co.*, 864 F.Supp. 569 (E.D.La.1994); *Nichols v. Burlington Northern and Santa Fe Railway Co.*, 56 P.3d 106 (Colo.App.2002); *CSX Transportation, Inc. v. Adkins*, 264 Ga. 203, 442 S.E.2d 737 (1994), *cert. denied*, 513 U.S. 947 (1994); *Sabalka v. Burlington Northern and Santa Fe Ry. Co.*, 54 S.W.2d 505, 609 (Mo.App.2001); *Reasons v. Union Pacific R. Co.*, 886 S.W.2d 104 (Mo.App.1984); *Monaghan v. Union Pacific Railroad Co.*, 242 Neb. 720, 729, 496 N.W.2d 895, 901 (1993). This case law is reviewed in the Petition and will therefore not be further discussed here.

A properly instructed jury could reasonably return a verdict in favor of either Metz or in favor of CSXT on the issue of when Metz's cause of action accrued, based on the evidence presented on summary judgment, and the inferences that could be drawn from that evidence. Because different conclusions and inferences could be drawn from the evidence under the proper legal standard, the case was one for the jury and should not have been resolved on summary judgment. Only if an erroneous legal standard were applied by the Florida courts, holding that

the cause of action accrued as a matter of law at the first onset of any symptom, could the issue be resolved in CSXT's favor on summary judgment.

CONCLUSION

For these reasons, and for the reasons set forth in the Petition, Petitioner James A. Metz, Sr., respectfully prays this Honorable Court to issue its writ of certiorari to the District Court of Appeals for the First District of Florida, and to reverse the judgment of the Florida courts and remand this cause for trial.

Respectfully submitted,

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Counsel for Petitioner
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IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT IN AND FOR ESCAMBIA COUNTY, FLORIDA

JAMES A. METZ, SR., Plaintiff,	)	
vs.	)	Case No. 05-CA-625
CSX TRANSPORTATION, INC., a Virginia corporation, Defendant.	)	Division F

[The Following Exhibits Were Entered In This Court.]

* * *

PLAINTIFF'S EXHIBIT 2

JAMES METZ 03-01-02

S 53 YO WHO'S ON MAXIMUM DOSE OF GLUCOPHAGE, ACTOS, AND MICRONASE, STATES SINCE STARTING THE AMITRIPTYLINE THE NEUROPATHY IN HIS LEGS AND FEET IS NINETY PERCENT BETTER

ROS HEART AND LUNGS: PATIENT DENIES CHEST PAIN, PALPITATIONS, SHORTNESS OF BREATH WHILE WALKING, AT REST, AT NIGHT, OR WHILE CLIMBING STAIRS DENIES MORNING OR CHRONIC COUGH, COUGHING UP BLOOD OR MUCOUS, WHEEZING IN CHEST, SWOLLEN ANKLES OR FEET, OR NOCTURIA

INTESTINAL: PATIENT DENIES LOSS OF APPETITE, NAUSEA, INDIGESTION, DYSPHAGIA, HEARTBURN, VOMITING, VOMITING BLOOD, PAIN IN ABDOMEN, CHANGE IN BOWEL HABITS, CONSTIPATED MORE THAN TWICE A MONTH, LOOSE STOOLS MORE THAN ONCE A DAY, BLACK-TARRY STOOLS, OR BLOOD FROM RECTUM

O WT. 250 BP 140/86

NECK: NO MASSES, LYMPHADENOPATHY, THYROMEGALY, BRUITS, OR TENDERNESS. CAROTID PULSES ARE FULL AND STRONG.

HEART: REGULAR SINUS RHYTHM WITH NO MURMUR, RUB, OR GALLOP. PMI IS AT THE 5TH INTERCOSTAL SPACE IN THE MID-CLAVICULAR LINE.

LUNGS: CLEAR TO AUSCULTATION AND PERCUSSION

EXTREMITIES: NORMAL RANGE OF MOTION, NO TENDERNESS. NAILS NORMAL

A # 1 DM
2 NEUROPATHY FEET
3 HX. OF ELEV. CHOL.
#4 FATIGUE

P CK STOOLS AT HOME X SIX
BLD DRWN. FOR CMP, LP, CBC, TSH, PSA, AND HbA1C
INC HIS AMITRIPTYLINE TO 50 MG HS
RX # 30 W/5REF
SHOULD BE NOTED HE DID HAVE HIS EYE EXAM WITH DR. COLLIER THREE MONTHS AGO FOR HIS DIABETES EYE EXAM
RE/CK IN FOUR MONTHS

JAMES G. PACE M.D.

JGP/LL

THE STATE OF _____)
) SS
COUNTY OF _____)

AFFIDAVIT

Before me, the undersigned authority, personally appeared, who, being by me duly sworn, deposed as follows:

My name is (affiant) Cathy Garlock, I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am the custodian of the records of James G. Pace, MD.

Attached hereto are pages of records from James Metz, Sr. these ___ pages of records are kept by James G. Pace, MD in the regular course of business, and it was the regular course of business of for an employee or representative of with knowledge of the act, event, condition, opinion, or diagnosis recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time of the act, event, condition, opinion or diagnosis. The records attached hereto are the original or exact duplicates of the original.

Printed Name of Affiant: Cathy Garlock

SIGNED: Cathy Garlock

(AFFIANT)

In witness whereof I have hereunto subscribed my name and affixed my official seal this 26th day of October, 2006.

SIGNED: Jamie S. Goodman

(NOTARY) [SEAL] JAMIE S. GOODMAN
My commission MY COMMISSION EXPIRES
expires: 03/16/10

SEAL:

PLAINTIFF'S EXHIBIT 3

SOUTH BALDWIN REGIONAL MEDICAL CENTER
1613 NORTH MCKENZIE STREET
FOLEY, ALABAMA

REPORT OF OUTPATIENT CONSULTATION

PATIENT NAME: JAMES METZ MR #: 114332

ATTENDING PHYSICIAN:
JAMES G. PACE, M.D. RM #:

CONSULTING PHYSICIAN:

ROGER ORTH, M.D. DATE: 03/19/2002

DATE OF BIRTH

Xxxxxxx x, xxxx

REASON FOR CONSULTATION

The consultation is regarding Hemoccult-positive stools.

HISTORY

This 53-year-old male is being seen at the request of Dr. Pace for Hemoccult-positive stools. He visited Dr. Pace for a routine physical with concerns of his strong family history of cancer on his mother's side, which has been mostly lung cancers. He has no gastrointestinal symptoms at this time, though he had a prior history of severe reflux for several years and took a large quantity of Rolaids. His symptoms suddenly resolved in 1995 after an intense vomiting episode.

He denies any nausea, vomiting, dysphagia, odynophagia, pyrosis, water brash, abdominal pain or bloating, diarrhea, constipation, hematochezia, melena, tenesmus, or history of peptic ulcer or hepatobiliary disease.

PAST MEDICAL HISTORY

His past medical history includes type 2 diabetes diagnosed in 1992, hypertension, and posttraumatic stress syndrome (Vietnam). He is being evaluated for Agent Orange disability.

ALLERGIES

His allergies are none known.

MEDICATIONS

His medications include BC Powder q.d., Glucophage 1 g b.i.d., glyburide 10 mg b.i.d., Actos 45 mg q.d., reserpine 0.25 mg q.d., Pravachol 20 mg q.h.s., Prozac 20 mg q.d., allopurinol 300 mg q.d., Elavil 50 mg q.h.s., and Ambien 10 mg q.h.s.

SOCIAL HISTORY

He has a prior history of heavy alcohol use but quit last August. He denies tobacco use. He is a carman at CSX Railroad. He is married with two children and three grandchildren.

FAMILY HISTORY

His family history is positive for lung cancer in his mother and several of her siblings. It is negative for other cancers, heart disease, or diabetes.

REVIEW OF SYMPTOMS

Cardiovascular: History is positive for hypertension. Endocrine: History is positive for type 2 diabetes, not following his recommended lifestyle modifications. Psychiatric: History is positive for posttraumatic stress syndrome from Vietnam. Constitutional, HEENT, Hematology, Oncology, Respiratory, Rheumatology, Genitourinary, Neurology, and Dermatology: History is negative.

PHYSICAL EXAMINATION

GENERAL: He is an obese, middle-aged white male in no acute distress.

NEUROLOGIC: He is alert, cooperative, and oriented. He walks easily with a normal gait without assistance.

HEENT: Head is normocephalic, atraumatic. Pupils are equal, round, and reactive to light. Sclerae are non-icteric. Conjunctivae are pink with moist mucous membranes.

NECK: The neck is supple without lymphadenopathy, thyromegaly, mass, or tenderness.

CARDIOVASCULAR: There are first and second heart sounds with a regular rate and rhythm without murmur noted.

LUNGS: The lungs have clear, equal bilateral breath sounds, non-labored.

ABDOMEN: The abdomen is soft, round, nontender, and non-distended with bowel sounds present. There is no organomegaly, mass, bruit, or costrovertebral angle tenderness noted.

EXTREMITIES: The extremities are without clubbing, cyanosis, or edema.

IMPRESSION AND PLANS

1. A 53-year-old male with recent Hemoccult-positive stools, as well as age-related risk for colon cancer. We will schedule colonoscopy to rule out neoplasm, polyps, inflammatory process, arteriovenous malformation, or other pathology. If colonoscopy is normal, we will proceed with upper endoscopy to evaluate for bleeding source. We will also obtain recent lab work from Dr. Pace.

2. History of severe gastroesophageal reflux, resolved suddenly and spontaneously several years ago after vomiting episode. This may represent an esophageal tear which has scarred tightly and prefenting reflux. However, I have discussed with patient the need of upper endoscopy to rule out Barrett's esophagus secondary to long-term reflux as well as possible long-term complications such as esophageal cancer. He states he understands these concepts but wishes to hold off on

upper endoscopy unless colonoscopy is completely normal.

3. Type 2 diabetes and hypertension. Followed by his primary care physician.

I, Roger Orth, M.D., have seen and evaluated this patient and agree with the above assessment and plans. I appreciate the opportunity to assist in his care and will keep you informed of our findings.

ROGER ORTH, M.D.
BY JENISA RYALS, PA-C

JR/DWS
D: 03/19/2002
T: 03/20/2002
JOB#: 7816
cc: James G. Pace, M.D.

CERTIFICATION OF MEDICAL RECORDS

I hereby certify that the attached medical records of:

James Metz	**xx/xx/xxxx**
PATIENT NAME	**DATE OF BIRTH**

to my best information and belief is a true copy of the medical record on file at South Baldwin Regional Medical Center, 1613 North McKenzie Street, Foley, AL for date(s) of service:

03/19/2002

That these records were prepared by the medical facility personnel during the course of business at or

near the time of the visit; that I am the duly authorized Custodian of Medical Records and that I have the authority to certify same.

10-26-06 **/s/ Lounette Ingram**
DATE **LOUNETTE INGRAM, RHIT**
DIRECTOR, HEALTH INFORMATION MANAGEMENT

Sworn and subscribed before me on this the 26 day of Oct 2006.

/s/ [Illegible]
NOTARY PUBLIC
My Commission Expires:
6/23/08

PLAINTIFF'S EXHIBIT 5

JAMES METZ 05-06-02

S 53 YO HB OF PAIN IN HIS R SHLDR AND ALSO NEEDS A REFILL ON THREE PRESCRIPTIONS

O BP 136/78

PT HAS PAIN WITH FORWARD FLEXION AND ABDUCTION OF THE R SHLDR WITH SOME TENDERNESS ON THE TOP OF THE R SHLDR

A TENDINITIS R SHLDR

P TRIGGER POINT INJ WITH 30 MG DEPO MEDROL AND ONE CC 1% XYLOCAINE

RX ACTOS 45 MG # 21 ONE P O DAILY W/10REF

RX PRAVACHOL 20 MG # 21 ONE P O HS W/10REF

RX RESERPINE 0.25 MG # 21 ONE P O DAILY W/10REF

ADVISED IF SHLDR NOT IMPROVED IN TWO WKS TO CALL AND WILL SCHED ORTHOPEDIC CONSULT

JAMES G. PACE M.D.

JGP/LL

THE STATE OF _____)
) SS.
COUNTY OF _____)

AFFIDAVIT

Before me, the undersigned authority, personally appeared, who, being by me duly sworn, deposed as follows:

My name is (affiant) Cathy Garlock, I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am the custodian of the records of James G. Pace, MD.

Attached hereto are pages of records from James Metz, Sr. these ___ pages of records are kept by James G. Pace, MD in the regular course of business, and it was the regular course of business of an employee or representative of with knowledge of the act, event, condition, opinion, or diagnosis recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time of the act, event, condition, opinion or diagnosis. The records attached hereto are the original or exact duplicates of the original.

Printed Name of Affiant: Cathy Garlock

SIGNED: Cathy Garlock

(AFFIANT)

In witness whereof I have hereunto subscribed my name and affixed my official seal this 26th day of October, 2006.

SIGNED: Jamie S. Goodman

(NOTARY) [SEAL]

JAMIE S. GOODMAN
MY COMMISSION EXPIRES
03/16/10

My commission expires:

SEAL: